United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH E. WISE, et al.,
Appellants,

vs.

CORNELIUS C. WATTS, et al.,
Appellees.

NO. 2719.

Brief for Appellants

JOSEPH E. WISE AND LUCIA J. WISE

SELIM M. FRANKLIN
Attorney for Appellants

Filed this .....day of....., 1916.

Clerk.

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BRIEF FOR APPELLANTS JOSEPH E. WISE AND LUCIA J. WISE.

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STATEMENT OF THE CASE.

This is a suit to quiet title, brought by Cornelius C. Watts and Dabney C. T. Davis, as plaintiffs, to quiet their title to a certain tract of land containing nearly 100·000 acres, in Santa Cruz (formerly Pima) County, Arizona called "Baca Float No. 3."

All the defendants deny plaintiffs' title, and each defendant filed a cross bill asserting title in himself,

either to all of the tract or to a certain undivided interest therein, adversely not only to plaintiffs, but to the other defendants.

The lower court, in its decree, adjudged the title as follows:

(1) Joseph E. Wise, an 1-38 interest.

(2) Margaret W. Wise, an 1-38 interest.

(3) Watts and Davis, plaintiffs, an 18-19 interest in the south half of the tract.

(4) Jennie N| Bouldin, an 18-38; David W. Bouldin, an 18-76· and Helen Lee Bouldin, 18-76; being a total of 18-19 interest, in the north half of the tract.

The court further decreed that a temporary injunction theretofore issued, restraining Joseph E. Wise from erecting certain fences on the tract, be made perpetual, as to the south half thereof.

From this decree Joseph E. Wise and Lucia J. Wise, his wife, have appealed to this court. All the other parties except Jesse H. Wise and Margaret W. Wise have also appealed from the decree.

This brief is written and submitted for Joseph E. Wise, appellant, as claimant of an undivided (approximately) two-thirds interest in the entire tract, and sole owner of a certain 160 acres thereof; and for his wife, Lucia J. Wise, appellant, as claimant of a certain 40 acres thereof.

I.

HISTORY OF BACA LOCATION NO. 3.

On June 21, 1860, Congress passed an Act (12 Stat. at L. 71, Chap. 167), granting to the heirs of Luis Maria Baca, the right to select and locate five tracts of 100·000 acres each, on the unoccupied, non-mineral, public lands.

Section 6 of the Act is as follows:

> "And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca who make claim to the same tract of land as is claimed by the town of Las Vegas, to select, instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them; proided, however, that the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer."

Luis Maria Baca died in 1827. He was married three times. He had 19 children and these children, or their descendants, were living in 1860, when the above Act was passed.

Three different tracts of land were selected by John S. Watts, attorney for the heirs of Baca, as and for Location 3, under the rights granted to the heirs of Baca by the Act aforesaid.

The first tract was selected by him on October 30, 1862, being a tract of land of about 100,000 acres, in the form of a square, at a place known as the Bosque Redondo, on the Pecos river, Territory of New Mexico. This selection was approved by the surveyor general of New Mexico on November 8, 1862. However, on January 18, 1863, Watts made application to the Commissioner of the General Land Office to withdraw this selection, with a view to making another selection in a more desirable locality. This application was allowed February 5, 1863. 29 L. D. 45-46.

The second tract was selected by him June 17, 1863, being the tract in the Territory of Arizona, described as commencing at a point one mile and a half from the base of the Salero mountain, etc. This application is as follows:

> "Santa Fe, New Mexico, June 17, 1863.
> John A. Clark, Surveyor General, Santa Fe, New Mexico.
>
> I, John S. Watts, the attorney for the heirs of Don Luis Marie Cabeza de Baca, have this day selected as one of the five locations confirmed to said heirs under the 6th section of the Act of Congress approved June 21, 1860, the following tract, to-wit: Commencing at a point one mile and a half from the base of the Salero mountain, in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles thirty-six chains and forty-four links; thence south twelve miles, thirty-six

chains and forty-four links; thence east twelve miles, thirty-six chains and forty-four links; thence north twelve miles, thirty-six chains and forty-four links, to the place of begining, the same being situate in that portion of New Mexico, now included by Act of Congress approved February 24, 1863, in the Territory of Arizona. Said tract of land is entirely vacant, unclaimed by any one, and is not mineral to my knowledge. JOHN S. WATTS,
Attorney for the Heirs of Luis Maria Cabeza de Baca."
Tr. p. 174.

This location or selection was approved by John A. Clark, Surveyor General of New Mexico, on June 17, 1863 (Tr. p. 175), and is the specific tract of land involved in this case, to which the respective parties seek to quiet their respective titles.

The third tract was selected by John S. Watts as attorney for the heirs of Luis Maria Baca, under an application of date April 13, 1866, made by him as attorney for the heirs of Luis Maria Cabeza de Baca, to the Commissioner of the Land Office, in which he states that the hostility of the Indians prevented a personal examination of the tract located by him in 1863, prior to his making the selection, and not having a clear idea as to the direction of the different points of the compass, when the selection was made, a mistake was made which would result in leaving out most of the land intended to be included in the location, and under these circumstances he requests—we will quote now from the application itself:

"that the Surveyor General of New Mexico be authorized to change the initial point so as to commence at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence from said beginning point north twelve miles, thirty-six chains and forty-four links; thence east twelve miles thirty-six chains and forty-four links; thence south twelve miles, thirty-six chains and forty-four links; thence west twelve miles, thirty-six chains and forty-four links, to the place of beginning. I beg leave further to state that the land which will be embraced by this change of the initial point is of the same character of unsurveyed, vacant and public land as that which would have been set apart by the location as first solicited, but it is not the land intended to have been covered by said location but the land to be included within the boundaries above designated is the land that was intended to be located, and was believed to have been located upon until preparations were made to survey said location." Tr. p. 176.

In compliance with the foregoing application, the Commissioner of the Land Office, by letter dated May 21, 1866, addressed to the Surveyor General of New Mexico, directed that the survey of the location be made in accordance with the amended description as set forth in Mr. Watts' application of April 30, 1866. In this letter the Commissioner, amongst other things, said:

"The papers thus returned are herewith transmitted to you with directions that you cause the survey to be executed in accordance with the amended description in Mr. Watts' application of

the 30th April last, provided by so doing the outboundaries of the grant thus surveyed **will embrace vacant lands not mineral.** Tr. p. 177.

The tract of land described in this amended location is what we call the 1866 location, being the third selection made, as aforesaid.

The only two selections necessary to be considered in the present case are the 1863 location, and the 1866 locations.

The following diagram shows the tract as located in 1863, with the initial point one mile and a half N. 45° E. from the base of the Salero mountain, which we designate as Tract 1; and also shows the tract described in the amended location of 1866, with initial point 3 miles west by south from the building known as Hacienda de Santa Rita, which we designate as Tract 2; as more fully shown in Wise Exhibit 34, a map sent up with the record; and Transcript, p. 381 where this map is printed.

The map, Exhibit 34, and the following diagram taken therefrom, show the Salero mountain, being the initial point of the 1863 location; the Hacienda de Santa Rita, being the initial point of the 1866 location; and also show a tract of some 6,000 acres that is included within the limits of both locations. This tract we call the "overlap," being that part of the 1866 location which overlaps the 1863 location, and is common to both.

DIAGRAM OF 1863 and 1866 LOCATIONS.

BACA LOCATION NO. 3

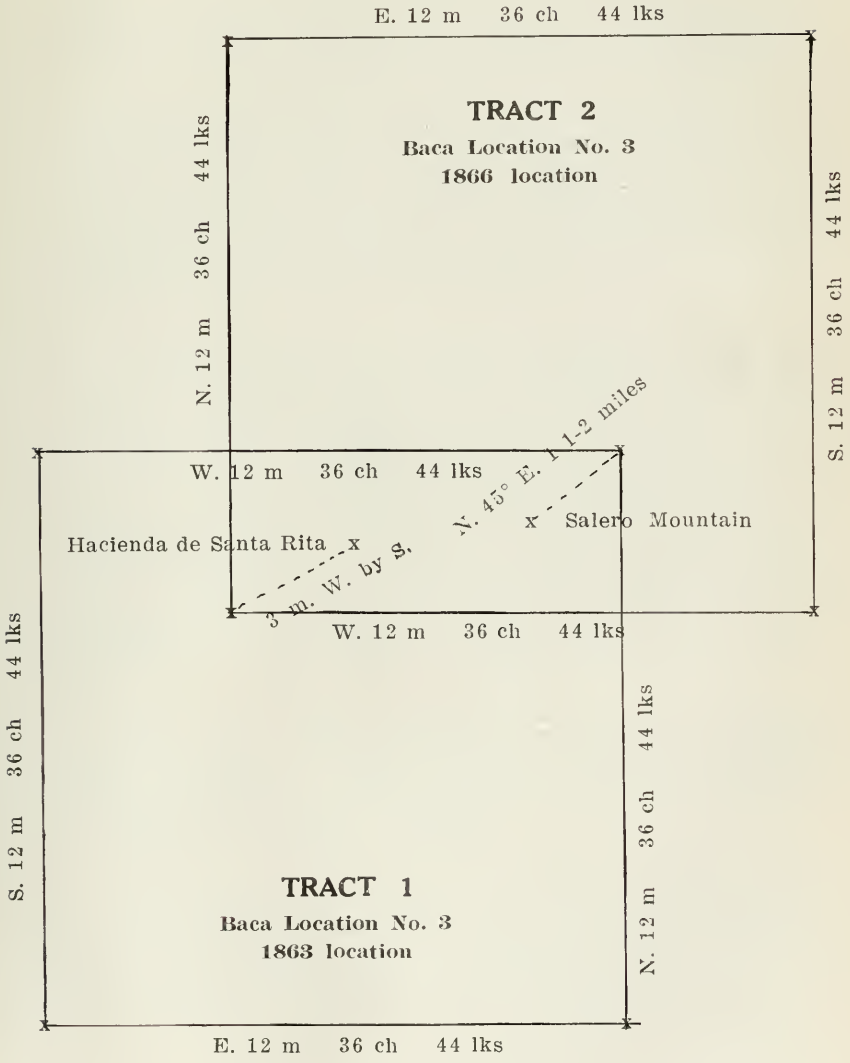

Diagram of 1863 and 1866 Locations, Baca Location No. 3.

The Salero mountain, being the initial point of the 1863 location, Tract 1, was and is a well known mountain, shown upon the maps of that period and thereafter.

The Hacienda de Santa Rita, the initial point of the 1866 location, Tract 2, consisted of a group of adobe houses, erected about 1860 by a mining company operating some mines in the Santa Rita mountains, and was and still is also a well known point.

J. Ross Brown in his book published in 1869, by Harper Brothers, entitled "Adventures in the Apache Country· Tour Through Arizona and Sonora," states that he visited the **Hacienda de Santa Rita** in 1860, and refers to the Baca Float No. 3 in the Santa Rita mountains. ¡ In this book is an illustration of the Hacienda de Santa Rita as it existed in 1860, when J. Ross Brown visited it. Tr., p. 251.

Tract 2, the 1866 location, is situated in the Santa Rita mountains, in what formerly was Pima, and now is Santa Cruz County, Arizona.

Tract 1, the 1863 location, is situate in the valley of the Santa Cruz river, extending into the foothills on either side thereof, also in what was formerly Pima, and since 1899 has been Santa Cruz County, Arizona.

From 1866, down to July 25, 1899, a period of over 33 years, the tract of land described in the 1866 location,

Tract 2 on the diagram, was known as "Location Number 3 of the Baca Series," or "Baca Float No. 3;" and it was considered by the Land Office as the tract of land which the heirs of Baca had selected as Location 3 under their right to locate the five tracts granted them by Congress. No survey of the tract, however, was made by the government of the United States; some of the Surveyors General holding that the selection was mineral land and not subject to selection, and some refusing to make the survey because the estimated expense thereof was not advanced by the grant claimants.

On July 25, 1899, upon the application of some of the grant claimants for a survey of this 1866 location, the Secretary of the Interior investigated the validity of the location, and in a decision, wherein he reviews in detail the history of the three selections, decided that the 1866 location was not an amendment of the 1863 location, although pretending to be such, but was, under the guise of an amendment, the selection of an entirely different tract of land; and he held that, as this 1866 selection was made after the expiration of the three years limited by the Act of Congress for the making of selections, it was invalid, and the claimants were bound by the selection made in 1863 to the tract described in that selection. 29 L. D. 44-54.

During the 33 years intervening from 1866, the date of the 1866 location down to 1899, when the Secretary made the foregoing decision, there were two different sets of claimants to Baca Location No. 3; one set claim-

ing the tract described in the 1863 location, and the other set claiming the tract described in the 1866 location. Many deeds were made by the different sets of claimants.

Those claiming the tract under the 1863 selection, described the land in their deeds according to the specific description set forth in the 1863 selection, that is, "Commencing at a point one mile and a half from the base of the Salero mountain in a direction north 45 degrees east from the highest point of said mountain, running thence" each course, west, south, east and north 12 miles, 36 chains and 44 links, being the Tract 1 on the diagram.

While those claiming the tract under the 1866 selection, described it as "Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence" each course, north, east, south and west 12 miles, 6 chains and 44 links.

The plaintiffs in this action, and defendants Bouldin, deraign their title under that set of claimants to whom was conveyed the tract described in the 1866 location, being Tract 2 on our diagram.

Defendant Joseph E. Wise (appellant), defendant Santa Cruz Development Company and the Intervenors deraign their respective titles under the set of claimants to whom was conveyed the tract described in the 1863 location, being Tract 1, on our diagram.

No survey of the 1863 location was made until 1905, when the Surveyor General of Arizona caused the same to be surveyed by Philip Contzen. The map of this survey is "Plaintiffs' Exhibit Q," sent up with the record in this case. On the diagram in this brief, the tract so surveyed is designated "Tract 1."

The Secretary of the Interior refused to file the plat and field notes of this survey. On the contrary, he ordered the land open to entry under the public lands of the United States. A suit was then brought before the Supreme Court of the District of Columbia, by certain claimants of Baca Location No. 3, against the Secretary of the Interior, wherein they sought to enjoin his disposing of said lands as public lands of the United States, and to compel him to approve and file the map and field notes made by Contzen, "for the purpose of defining the outboundaries of the land and segregating the same from the public lands of the United States."

That court, on June 3, 1913, granted the decree as prayed for. The Secretary of the Interior appealed therefrom to the Court of Appeals and then to the Supreme Court of the United States, and the Supreme Court of the United States, on June 22, 1914, decided that the approval by the Surveyor General of the tract selected by Watts in 1863 was final; that the title to that tract passed to the heirs of Baca at that time; that the United States had no title to the lands; and the court further ordered the field notes and the Contzen survey to be filed by the Secretary of the Interior, so that

the lands, as surveyed, could be segregated from the public domain. Lane vs. Watts, 234 U. S., 525-542.

After the Supreme Court rendered this decision, the plaintiffs in the present action, Cornelius Watts and Dabney C. T. Davis, Jr., who deraign their title under claimants of the 1866 location, brought the present suit, wherein they claim to be the owners of the tract described in the 1863 location, and seek to have their title quieted as against all the other parties to the action.

The Surveying, Monumenting and Platting of the 1866 Location, by George J. Roskruge, County Surveyor of Pima County, in 1887.

Repeated requests were made by certain of the grantees of certain of the heirs, to the various Surveyors General of Arizona, to make survey of Tract 2, the amended selection of 1866, but the respective Surveyors General repeatedly refused to do so, principally because the estimated expense for making the survey was not deposited by the applicants; also because the tract of land was mineral in character, and for that reason not subject to selection.

In 1887, George J. Roskruge, County Surveyor of Pima County, Arizona, at the request of David W. Bouldin, Sr., made a survey of Tract 2, the 1866 location. He ran his lines from the Hacienda de Santa Rita, the commencing point of the 1866 location, and thence ran his lines in accordance with the courses and distances set forth in the 1866 description. At each

corner of the tract so surveyed, he erected a large monument, and on each side line he also erected monuments, so as to mark the boundaries distinctly on the ground.

He filed a copy of the plat in his office as County Surveyor, in 1887. A copy of the topographic map of the survey was also filed with the Surveyor General of Arizona.

In July, 1893, the Board of Supervisors of Pima County adopted an official map of Pima County being a map made by Roskruge, who was still County Surveyor, and on this map Tract 2, being the amended Baca location of 1866, was platted and designated as **"Baca Float No. 3,"** as will be seen from the map of Pima County, Defendants' Wise Exhibit 3, which is sent up with the record in this case. (Testimony of Roskruge, Tr. p. 233-248.)

So that in 1887, Tract 2, the 1866 location, was surveyed and monumented on the ground so that its boundaries could be readily traced. A plat of the survey was filed in the office of the United States Surveyor General of Arizona, in which the tract was also designated, "Baca Float No. 3," and the tract was delineated on the official map of Pima County and thereon designated and named, "Baca Float No. 3."

The Title to Only an Undivided 18-19 Interest in the Tract Is Involved in This Appeal.

Luis Maria Baca, to whose heirs the tract of land in dispute was granted, died in 1827. He had been married three times. He had 19 children, one of whom Antonio, died leaving a child, before the death of his father, and the other 18 children survived their father.

The heirs of the deceased son, Antonio, by certain mesne conveyance, conveyed their interest in the 1863 location, being an undivided 1-19 interest in the entire tract, to the appellant Joseph E. Wise, and defendant Margaret W. Wise. Neither the plaintiffs, nor defendants (appellees) Bouldins, nor any other party to this suit, claim any part of the 1-19 interest inherited by this son Antonio, or by his heirs; nor do any of them deraign any title under Antonio or his heirs. They deny, however, that this Antonio was a son, or his descendants heirs of the original Baca.

The trial court found and decreed that this Antonio was a son, who died before his father, leaving a son who was his heir, who also died leaving children, and that appellant, Joseph E. Wise, and defendant Margaret W. Wise, by mesne conveyances from the heirs of the deceased son of this Antonio, are the owners of this 1-19 interest, each owning one-half of this 1-19 interest. to-wit, 1-38 interest each, in the entire tract. The correctness of this part of the decree is conceded by appellants in the present appeal. The plaintiffs and

defendants Bouldin have, by separate appeal, appealed from that part of said decree.

But the lower court further decreed that plaintiffs, Watts and Davis, were the owners of the remaining 18-19 interest in the south half, and that the defendants Bouldin were the owners of the remaining 18-19 interest in the north half, of the tract of land in dispute. This part of the decree is assigned by appellants Wise as error.

Therefore, the present brief of appellants Wise is devoted only to the consideration of such facts and law as apply to the title and ownership of the undivided 18-19 interest which the court decreed to be owned by plaintiffs, (appellees), Watts and Davis, and defendants, (appellees), Bouldin; and as to which appellants Wise were decreed to have no title.

Deeds Executed by Heirs of Baca to John S. Watts.

The heirs of Baca, except the son and heirs of the son Antonio, executed three deeds to John S. Watts, wherein they conveyed to him the Location No. 3 by the specific description set forth in the 1863 selection, being Tract 1, on our diagram.

The first two deeds were each dated May 1, 1864. Therein certain heirs of Baca, who collectively owned 13-19 interest in the entire tract, conveyed all their right, title and interest to John S. Watts. (Plaintiffs' Exhibits C and D, Tr. pp. 163-164).

The third deed was dated May 30, 1871. In this deed all the heirs of Baca, except the son and heirs of the son Antonio did "relinquish and quitclaim to said John S. Watts all their right, title and interest in all the lands in said deed of May 1st, 1864, mentioned and described." (Plaintiffs' Exhibit O, Tr. p. 197.) Under this deed John S. Watts acquired a further 5-19 interest in said tract of land, making a total of 18-19 interest which he so acquired.

No other deeds were executed by any of the heirs of Baca to John S. Watts.

It was under these deeds that John S. Watts became vested with an undivided 18-19 interest in the tract of land described in the 1863 location.

The Cornelius C. Watts who is one of the plaintiffs herein, is no kin of said John S. Watts.

Deed from John S. Watts to Christopher E. Hawley, of Date January 8, 1870.

After the heirs of Baca had executed to John S. Watts the first two deeds above mentioned, each of date May 1, 1864, under which Watts became vested with title to an undivided 13-19 interest in the tract of land described in the 1863 location, Tract 1 on our diagram; and after John S. Watts had filed his application of April 30, 1866, to amend the 1863 location by substituting therefor the 1866 location; and after said application had been granted, he executed to Christopher E. Hawley, of Binghamton, New York, a deed of remise, release and quitclaim, of date the 8th day of

January, 1870, wherein he remised, released and quitclaimed to Hawley the tract of land described in the 1866 location, describing the same as being situate in the Santa Rita mountains, Arizona, and being bounded and described as follows; "Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence," etc., being the identical description of the tract of land as set forth in his 1866 selection, and being Tract 2 on our diagram. This deed is Plaintiffs' Exhibit N, Tr. pp. 193-196.

It was after the execution of this quitclaim deed by Watts to Hawley, to-wit, on May 30, 1871, that the heirs of Baca, excepting the son Antonio and his heirs, executed to Watts the third deed heretofore mentioned, wherein they relinquished and quitclaimed to Watts all their interest in the tract described in the prior deeds of May 30, 1864. John S. Watts acquired, as before stated, under this third deed from the Baca heirs, an additional 5-19 interest in the tract described in the 1863 location; being acquired after he had deeded to Hawley.

The lower court held that this after-acquired title or interest inured to Hawley, grantee under the quitclaim from John S. Watts; and the court further held that this quitclaim deed to Hawley vested him with the full 18-19 interest in the tract described in the 1863 location, Tract 1 on our diagram, although the deed itself only purports to quitclaim the tract described in the 1866 location, Tract 2 on our diagram. This is assigned as error.

In 1873 John S. Watts left the Territory of New Mexico and made his home in Bloomington, Indiana, where, in the year 1876, he died. He left a widow, two sons and three daughters. Prior to his death he executed no deed, other than the deed to Hawley, purporting to convey any interest in either the 1863 or 1866 selection of Baca Float No. 3. Therefore, upon his death, his widow and children inherited the tract of land described in the 1863 location, which during his lifetime he had not quitclaimed or conveyed to anyone.

The plaintiffs (appellees) Watts and Davis, and defendants (appellees) Bouldin, deraign their title under certain mesne conveyances from Christopher E. Hawley, each of which deeds describes the lands therein conveyed by the specific description of the 1866 location.

Appellant Joseph E. Wise, defendant Santa Cruz Development Company, and Intervenors, deraign their respective interests in the said undivided 18-19 interest, under mesne conveyances from the widow and heirs of John S. Watts, each of which deeds describes the lands therein conveyed by the specific description of the 1863 location.

Deeds Under Which Plaintiffs, Cornelius C. Watts and Dabney C. T. Davis, Jr., and Defendants Bouldin Deraign Their Title Under John S. Watts.

The deeds under which plaintiffs and defendants Bouldin deraign their title under John S. Watts, are as follows:

	I	
John S. Watts to Christopher E. Hawley	Quitclaim deed dated January 8, 1870. Quitclaims the tract described in 1866 location. Plaintiffs' Exhibit N, Tr. pp. 193-196.	
	II	
Christopher E. Hawley by James Eldredge, attorney in fact, to John C. Robinson	Deed dated May 5, 1884. Conveys tract described in the 1866 location. Plaintiffs' Exhibit T, Tr. p. 208.	
	III	
Powhatan W. Bouldin and wife, and James E. Bouldin to John C. Robinson	Deed dated November 12, 1892. Conveys south half of tract described in 1866 location. Plaintiffs' Exhibit X, Tr. p. 216.	
	IV	
John W. Cameron to John C. Robinson	Declaration of Trust, dated November 28, 1892. Recites that he will hold the property about to be conveyed to him by John C. Robinson, in trust, and that when he makes sale thereof, he will divide the proceeds in certain proportions, to John C. Robinson, Mrs. A. T. Belknap, James Eldredge, Charles A. Eldredge and himself. Plaintiffs' Exhibit DD, Tr. p. 226.	

	V	
John C. Robinson to Powhatan W. Bouldin and James E. Bouldin	Deed dated December 19, 1892. Conveys north half of the tract described in the 1866 location. Wise Exhibit 38, Tr. p. 400.	
	VI	
John C. Robinson to John W. Cameron	Deed dated December 1, 1892. Conveys south half of the tract described in the 1866 location; being the property referred to in the Declaration of Trust, IV. Wise Exhibit 8, Tr. p. 255.	
	VII	
John C. Robinson to Alex F. Mathews	Deed of assignment dated September 22. 1893. Authorizes conveyance by Cameron to Mathews and conveys his interest as cestui qui trust in south half of the tract described in the 1866 location under Cameron's declaration of trust. Plaintiffs' Exhibit U, Tr. p. 210.	

VIII

John W. Cameron and Mrs. A. T. Belknap to Alexander F. Mathews	Deed of assignment dated September 22, 1893. Authorizes conveyance by Cameron to Mathews, and conveys their interest as cestui qui trust in south half of the tract described in the 1866 location under Cameron's declaration of trust. Plaintiff's Exhibit Z, Tr. p. 221.

IX

James Eldredge to Alexander F. Mathews	Deed of assignment dated September 22, 1893. Authorizes conveyance by Cameron to Mathews, and conveys his interest as cestui qui trust in south half of 1866 location under Cameron's declaration of trust. Plaintiffs' Exhibit CC, Tr. p. 226.

X

Charles Eldredge to Alexander F. Mathews	Deed of assignment dated September 22, 1893. Authorizes conveyance by Cameron to Mathews, and conveys his interest as cestui qui trust in south half of the tract described in the 1866 location under Cameron's declaration of trust. Plaintiffs' Exhibit BB, Tr. p. 224.

	XI
John W. Cameron to Alexander F. Mathews	Deed dated September 25, 1893. Conveys south half of the tract described in the 1866 location. Plaintiffs' Exhibit AA, Tr. p. 223.
	XII
Powhatan W. Bouldin and wife, and James E. Bouldin to Alexander F. Mathews	Deed dated February 7, 1894. Convey their interest in south half of the tract described in the 1866 location. Plaintiffs' Exhibit EE, Tr. p. 229.
	XIII
John Ireland and Wilbur H. King to Alexander F. Mathews	Deed dated February 23, 1894. Convey all their interest in south half of the tract described in the 1866 location. Plaintiffs' Exhibit Y, Tr. p. 219.
	XIV
John C. Roobinson to Samuel A. M. Syme	Deed dated April 30, 1896. Conveys north half of the tract described in the 1866 location. Plaintiffs' Exhibit V, Tr. p. 213.

Alexander F. Mathews Died December 10, 1906, Leaving a Widow, Laura G. Mathews, and the Following Children: Mason Mathews, Charles G. Mathews, Elizabeth P. Mathews and Henry M. Mathews, Tr. pp. 149-150.

Samuel A. M. Syme and Laura G. Mathews, the widow, and the above four children, heirs of Alexander F. Mathews, deceased and Mason Mathews, Charles G. Mathews and Henry A. Mathews, as executors of the will of Alexander F. Mathews, deceased, to C. C. Watts and D. C. T. Davis, Jr., trustees, (the plaintiffs in this case)	Deed dated February 8, 1907. Convey all their right, title and interest in Baca Float No. 3, described by the 1863 location. Plaintiffs' Exhibit W, Tr. p. 214.

The court decreed that plaintiffs, under the foregoing deeds, were the owners in fee of an undivided 18-19 interest in the south half, and defendants Bouldin were the owners in fee of an undivided 18-19 interest in the north half of the tract described in the 1863 location. This part of the decree is assigned as error.

Abstract of Deeds, Etc., Under Which Joseph E. Wise, Santa Cruz Development Company and Intervenors Deraign Their Title.

The deeds and records under which appellant, Joseph E. Wise, defendant Santa Cruz Development Company, and the Intervenors, deraign their title to the 18-19 interest, aforesaid, are as follows:

I

John S. Watts having died intestate in 1876, his widow Elizabeth A. Watts, his two sons John Watts and J. Howe Watts, and his three daughters, Mary A. Wardwell, Louise Wardwell and Frances A. Bancroft, inherited his interest. Appellant, Joseph E. Wise, deraigns his interest under said heirs, under the following deeds and records:

II

John Watts (son), and Elizabeth A. Watts (widow), J. Howe Watts (son), Mary A. Wardwell, Louise Wardwell and Frances A. Bancroft (daughters), by John Watts, their attorney in fact, to David W. Bouldin	Deed dated September 30, 1884. Convey an undivided 2-3 of all their right, title and interest in the tract described in the 1863 location. Defendants Wise Exhibit 16, Tr. p. 272.

Note: This David W. Bouldin was the grandfather of the David W. Bouldin who is one of the defendants (appellees) in this action. Tr. p. 148.

III

David W. Bouldin to John Ireland and Wilbur H. King	Deed dated February 24, 1885. Conveys undivided 1-9 interest of all his right, title and interest in the tract described in the 1863 location. Defendants Wise Exhibit 18, Tr. p. 312.

IV

Judicial sale of all the interest of David W. Bouldin. Attachment lien, March 14, 1893. Judgment foreclosing same, May 2, 1895. In suit of John Ireland and Wilbur H. King vs. David W. Bouldin, in District Court of the First Judicial District of the Territory of Arizona, in and for Pima County. Judicial sale, under said judgment, July 31, 1895.

In this suit, brought by Ireland and King against David W. Bouldin, on March 13, 1893, to recover some $5,000 with interest, a writ of attachment was levied on the interest of David W. Bouldin in the tract described in the 1863 location. Bouldin appeared in the action; thereafter he died and Leo Goldschmidt, administrator of his estate, was substituted as defendant; thereafter and on May 2, 1895, judgment was rendered in favor of Ireland and King for $8,550, the attachment lien was foreclosed, the property ordered sold, and the clerk directed to issue an order of sale to the sheriff directing him to sell the same. Order of sale was duly issued; notice of sale given, as required by law, and on July 31, 1895, all the interest which David W. Bouldin had on March 14, 1893, in the tract described in the 1863 location, was sold by the sheriff, to Wilbur H. King, for $2,000, and sheriff's Certificate of Sale was duly issued to him therefor. Defendants Wise Exhibit 19, Tr. p. 456.

No redemption from the sale was made.

V

David W. Bouldin, by Lyman Wakefield, Sheriff of Pima County, to Wilbur H. King	Sheriff's deed, dated January 16, 1899. Executed under the above mentioned judgment and sale. Defendants Wise Exhibit 23, Tr. p. 319.

VI

Mrs. A. M. Ireland, widow of John Ireland, to Joseph E. Wise	Deed dated April 24, 1907. Conveys all her interest in tract described in the 1863 location. Defendants Wise Exhibit 25, Tr. p. 323.

Note: John Ireland died March 15, 1896, leaving a widow, Mrs. A. M. Ireland, and certain children and grandchildren, who are the "Intervenors" in this case. It was stipulated that the interest acquired by John Ireland was community property, which upon his death was vested one-half in his widow and one-half in "Intervenors," his heirs. Tr. p. 150.

VII

Wilbur H. King to Joseph E. Wise	Deed dated April 24, 1907. Conveys all his right, title and interest in the tract described in the 1863 location, and all interest acquired by him under the sheriff's sale aforesaid. Defendants Wise Exhibit 24, Tr. p. 320.

David W. Bouldin, by John Nelson, Sheriff of Pima County, to Joseph E. Wise	Deed dated October 5, 1914. Conveys all the interest which David W. Bouldin had in tract described in the 1863 location, on March 14, 1893, and sold under decree foreclosing attachment lien of that date, to Wilbur H. King, and by King sold to Joseph E. Wise. Defendants Wise Exhibit 26, Tr. p. 323.

This deed recites the order of the Superior Court, successor of the territorial district court, directing the Sheriff to execute a new deed to Wise, as assignee of King, to cure certain defects in the deed executed by Wakefield. Sheriff to King, supra V.

Deeds Under Which the Santa Cruz Development Company Deraigns Title

As heretofore shown, the widow and heirs of John S. Watts, deceased, on September 30, 1884, conveyed an undivided 2-3 of all their right, title and interest in Tract 1, to David W. Bouldin, Sr. Thereafter they conveyed to James W. Vroom their remaining 1-3 interest by the following deeds:

I

John Watts and other heirs of John S. Watts to James W. Vroom	Deed dated October 25, 1899. Conveys an interest in the tract described in the 1863 location. Deed not in evidence, but testified to by John Watts.

	II
J. Howe Watts and other heirs of John S. Watts to John Watts	Deed dated October 25, 1899. Conveys their interest in the tract described in the 1863 location. Defendant Santa Cruz Development Company Exhibit 5.
	III
John Watts and wife to James W. Vroom	Deed dated February 3, 1913. Conveys tract described in the 1863 location. Defendant Santa Cruz Development Company exhibit 6.
	IV
James W. Vroom and wife to Santa Cruz Development Company	Deed dated February 3, 1913. Convey tract described in the 1863 location. Santa Cruz Development Company Exhibit 7.

Title of the Intervenors.

It will be remembered that David W. Bouldin, by deed dated February 21, 1885, conveyed to John Ireland and Wilbur H. King a 1-9 of the interest which he, Bouldin, had acquired under the deed from the Watts heirs to him of date September 30, 1884.

John Ireland died March 15, 1896, leaving surviving him as heirs and devisees, a widow, Mrs. A. M. Ireland, and certain children and grandchildren. Said children

and grandchildren are called Intervenors. It was stipulated in this case that the widow, Mrs. A. M. Ireland, was the owner of an undivided one-half interest, and the Intervenors of the remaining undivided one-half interest of the title acquired by John Ireland in his lifetime. Tr. p. 150. Mrs. Ireland conveyed her interest to Joseph E. Wise, by deed heretofore referred to; the remaining one-half of the interest of John Ireland belongs to the Intervenors.

The court should have decreed that Joseph E. Wise, in addition to the said 1-38 interest adudged to him by said decree, was also the owner of a further interest in the whole tract, as hereinafter tabulated and set forth, and the failure of the court so to decree is also assigned as error. Defendants Wise Assignment of Error XXI.

During the trial the court admitted in evidence, subject to the objections of plaintiffs, a duly authenticated copy of the record of a deed executed September 30, 1884, by John Watts and the other heirs and widow of John S. Watts, deceased, to David W. Bouldin, conveying to him an undivided 2-3 interest in Tract 1, the 1863 location, and said instrument was filed as part of the record in the case, marked Defendants Wise Exhibit 16, and also Defendants Wise Exhibit 17, being the deed hereinbefore referred to. Thereafter, and after the court had decided that all the interest acquired by John S. Watts from the heirs of Baca was conveyed by him to Hawley, under his deed to Hawley of 1870, the court sustained the objection of plaintiffs to said deed of 1884, to which ruling appellants Wise excepted. This ruling

of the court is assigned as error. Defendants Wise Assignments of Error V, VI and VII.

Upon the trial the court also admitted in evidence, subject to the objection of plaintiffs and defendants Bouldin, a duly authenticated copy of the judgment, record and proceedings in the case of John Ireland and Wilbur H. King vs. David W. Bouldin, hereinbefore referred to, being Defendants Wise Exhibit 19.

Thereafter, and after the court had decided that all the interest acquired by John S. Watts from the heirs of Baca was conveyed by him to Hawley, under his deed to Hawley of 1870, the court sustained the objection of plaintiffs to said documents, Defendants Wise Exhibit 19, to which ruling appellants Wise excepted. This ruling is assigned as error. Defendants Wise Assignment of Error VIII.

The 160-Acre Tract Claimed by Wise by Virtue of the Statute of Limitation.

Appellant, Joseph E. Wise, testified that for more than ten years prior to April, 1907, the date of the first deed to him from an owner of the grant, he had been in peaceful adverse possession of the following 160-acre tract of land, situate within the limits of the 1863 location, to-wit: The east half of the northwest one-fourth and the west half of the northeast one-fourth of section 35, township 22 south, of range 13 east; that he fenced up said tract in 1899, and had been in adverse and peaceful possession thereof continuously for a period of more than ten years prior to April, 1907, and that he

claimed the ownership of all of said 160 acres by virtue of adverse possession for ten years prior to April, 1907. On motion of plaintiffs this testimony was stricken out by the court, on the ground that it was immaterial; that no title could be acquired to any of said tract, under the statute of limitations of Arizona, until after the land had been segregated from the public domain; that the tract was not so segregated until the map and survey of Philip Contzen was approved and filed by the Secretary of the Interior in December, 1914; to which ruling Joseph E. Wise excepted, and this ruling is also assigned as error. Defendants Wise Assignments of Error IX and XX.

For the same reason the testimony of Lucia J. Wise, that since 1900 her mother, Mrs. Mary E. Sykes, had been in adverse and peaceful possession of a certain 40-ocre tract within the limits of said Baca Float No. 3, and described in paragraph 36 of the amended answer of defendants Joseph E. and Lucia J. Wise, cultivating and using the same for a continuous period of more than ten years thereafter, and until her death, in 1913, and that her daughter, defendant Mrs. Lucia J. Wise, as executrix, had been in possession thereof since her mother's death, was also stricken out by the court on motion of plaintiffs, to which ruling defendants Wise excepted. This also is assigned as error. Defendants Wise Assignment of Error X.

During the trial the court permitted the defendants Bouldin to introduce in evidence the following deeds and instruments, to-wit:

1. Deed from Powhatan W. Bouldin to Dr. M. A. Taylor, dated November 7, 1894, being Defendants Bouldins' Exhibit 1.

2. Sheriff's Certificate of Sale, Joseph B. Scott, Sheriff, to Lionel M. Jacobs, dated December 4, 1894, being Defendants Bouldins' Exhibit 2.

3. Deed from Lionel M. Jacobs to M. A. Taylor, dated December 4, 1894, being Defendant Bouldins' Exhibit 3.

4. Deed from James E. Bouldin to M. A. Taylor, dated April 25, 1895, being Defendant Bouldins' Exhibit 4.

5. Deed from M. A. Taylor to Belle Bouldin, dated November 28, 1896, being Defendant Bouldins' Exhibit 5.

6. Deed from Daisy Belle Bouldin and James E. Bouldin to D. B. Gracy, dated April 16, 1900, being Defendant Bouldins' Exhibit 6.

7. Deed from D. B. Gracey to James E. Bouldin, dated June 15, 1904, being Defendant Bouldins' Exhibit 7.

Defendants Wise objected to the introduction of each thereof, on the ground that the same was immaterial, and did not purport to convey the property in controversy; for the further reason that none of the grantors or parties mentioned in said deeds and certificate of sale had any interest to convey at the time of the execution

thereof. Said objections were overruled, to which exceptions were taken, and this ruling is also assigned as error. Defendants Wise Assignment of Error XII.

During the trial the court permitted the plaintiffs to introduce in evidence an instrument in writing executed by John S. Watts to William Wrightson, dated March 22, 1863, being Plaintiffs' Exhibit L, wherein said Watts purported to sell to said William Wrightson one of the unlocated Baca tracts, and "to make a full and complete title in fee simple for said land to said Wrightson, his heirs or legal representatives, whenever thereunto required." Defendants Wise objected to the introduction thereof in evidence, for the reason and upon the grounds that plaintiffs deraigned no title under said instrument; that there was no evidence showing that Christopher E. Hawley claimed or deraigned any interest or title under said instrument, and further that the same could not be used to vary the description in the deed subsequently executed by John S. Watts to Christopher E. Hawley.

Said objection was overruled and exception taken, and this also is assigned as error. Defendants Wise Assignment of Error XIII.

The Injunction Against Joseph E. Wise

While this suit was pending, and before the trial thereof, upon the application of plaintiffs, the court caused a writ of injunction to issue restraining the defendant Joseph E. Wise, pending the action,

"from erecting and re-erecting fences in, upon or around Baca Float No. 3, or any portion thereof, which would prevent or obstruct the said plaintiffs or their tenants from enjoying the use of said Float for grazing purposes, or which would prevent or obstruct free ingress or egress of the cattle of said plaintiffs or their tenants to and from the watering or drinking places upon said Float, or prevent or obstruct the use of said water and land as heretofore used."

In the decree in this case this writ of injunction is made perpetual. This part of the decree is also assigned as error, for the reason that this is a suit to quiet title, and not a suit to restrain trespass; there is no issue raised in the pleadings as to possession, or right of possession, and there is no evidence in the case that Wise was doing, or threatening to do, any of the matters or things, which the court has enjoined him from doing. And further, that as said defendant Joseph E. Wise has been decreed to be a tenant in common with the plaintiffs, as to the south half of the tract of land aforesaid, it was error for the court by its decree to perpetually enjoin him from the exercise of his rights as a tenant in common with plaintiffs. Defendants Wise Assignment of Error XXIII.

Title to the Overlap

The tract of land described in the 1866 location, with the beginning point at the Hacienda de Santa Rita, includes within its limits a portion of the tract of land described in the 1863 location, as shown on the diagram in this brief, and more accurately shown on the map of

the two locations, Defendants Wise Exhibit 34, Tr. p. 379, and the original exhibit itself. This area, common to the two locations, we call "the overlap;" it contains about 6,000 acres.

We concede that a conveyance of Tract 2, according to the description of the 1866 location, is a good conveyance for that portion of Tract 1, the 1863 location, so situate within the limits of Tract 2, which we call the overlap.

Therefore on January 8, 1870, when John S. Watts executed to Christopher E. Hawley his quitclaim deed, quitclaiming to him the tract described in the 1866 location, this deed did vest in Hawley all of the interest which John S. Watts then owned in the overlap.

We concede that all deeds under which plaintiffs deraign their title are good conveyances of the interest in said overlap, so conveyed by John S. Watts to Christopher E. Hawley, and that the plaintiffs, as the owners of the southern half of the tract of land described in the 1866 location, are the owners of an undivided interest in said overlap, and no more.

The remaining undivided interest in the overlap, as well as the 18-19 interest in the remaining part of the 1863 location, outside of the overlap, is, as we contend, owned by Joseph E. Wise, Santa Cruz Development Company, and Intervenors, in the proportions hereinafter set forth in this brief; and the court should have so decreed. The failure of the lower court so to decree is assigned as error.

SPECIFICATION AND ASSIGNMENT OF ERRORS.

I

The court erred in adjudging and decreeing that the plaintiffs Cornelius C. Watts and Dabney C. T. Davis, Jr., were at the commencement of this action and still are vested with absolute title in fee simple to an undivided eighteen-ninteenths (18-19) interest in the south half (1-2) of the tract or parcel of land in said judgment and decree described, and in quieting their title thereto; and said judgment and decree in that regard is contrary to the evidence in this case.

II

The court erred in adjudging and decreeing that the absolute title in fee simple to the north half of that certain tract or parcel of land described in said judgment and decree was at the time of the commencement of this action, and still is, vested to the extent of an undivided 18-38 interest in Jennie N. Bouldin; an 18-76 interest in David W. Bouldin, and an 18-76 interest in Helen Lee Bouldin, and in adjudging that any of said Bouldins had any interest whatsoever in said tract of land or any part thereof, and in quieting their title thereto; and said judgment and decree in that regard is contrary to the evidence in this case.

III

The court erred in adjudging and decreeing that the absolute title in fee simple was, at the commencement of this action, and still is, vested to the extent of an 18-19 interest in plaintiffs as to the south half, and 18-

19 interest in said Bouldins as to the north half, of the lands and premises described in the judgment and decree herein, and in quieting their respective titles thereto, for the reason that the evidence in this case conclusively shows and proves that plaintiffs and said defendants Bouldin claim and deraign whatever title they have under and by virtue of mesne conveyances from Christopher E. Hawley, and that the said Christopher E. Hawley deraigns his title thereto under that certain quitclaim deed of date January 8, 1870, executed by John S. Watts to said Hawley, as aforesaid; and that the said John S. Watts did not, at the date of his deed aforesaid, to said Hawley, own in fee simple or otherwise, an undivided 18-19 interest in the tract or parcel of land described in said judgment and decree, and therefore, the said Christopher E. Hawley did not acquire under the said quitclaim deed from John S. Watts, or in any other manner, or by any other deed, an undivided 18-19 interest in the said tract of land described in the decree, or an 18-19 interest in or to any part thereof.

IV

The court erred in overruling the objection of the defendants Joseph E. Wise and Lucia J. Wise to the offer and introduction by the plaintiffs of the deed executed to John S. Watts, by certain heirs of Luis Maria Baca, insofar as said deed pretended to be executed or to be a deed of conveyance of the following heirs of said Luis Maria Baca, to-wit: (1) Felipe Baca, (2) Domingo Baca, (3) Jesus Baca y Lucero 1st, (4) Jesus Baca y Lucero 2nd, (5) Josefa Baca y Sanchez.

V

The court erred, after it had admitted in evidence, subject to the objection of plaintiffs, a deed executed by John Watts, in his own proper person and as the attorney in fact for his brother, J. Howe Watts, and the other grantors, dated September 30, 1884, "Defendants Wise Exhibit 16" and "Defendants Wise Exhibit 17," in sustaining the said objection.

VI

The court erred in sustaining the objections of counsel for plaintiffs to the introduction in evidence by the defendant Joseph E. Wise of a duly authenticated copy of the record of a deed dated September 30th, 1884, executed by John Watts in his own proper person, and by Elizabeth A. Watts and other heirs of John S. Watts, deceased, by said John Watts as their attorney in fact, wherein they did convey unto said Bouldin an undivided two-thirds interest of all their interest in the tract of land described in the decree. Defendants Joseph E. Wise Exhibit "16" and "17."

VII

The court erred in not permitting the said Joseph E. Wise to introduce in evidence the said deed, or duly certified copies of the record of the said deed, executed by the heirs and widow of John S. Watts to David W. Bouldin.

VIII

The court erred in sustaining the objection of plain-

tiffs and defendants Bouldin to the introduction in evidence by the defendant Joseph E. Wise of a duly authenticated copy of the judgment, record and proceedings in that certain case or suit in the District Court of the First Judicial District of the Territory of Ariozna, in and for the County of Pima, entitled John Ireland and Wilbur H. King, plaintiffs, vs. David W. Bouldin, defendant, and thereafter being in the Superior Court of the State of Ariozna, in and for the County of Pima, as successor of the said District Court, "Defendants Wise Exhibit 19," which said judgment in said case, amongst other things, adjudged and decreed the foreclosure of an attachment lien upon, and directed the sale of, all the right, title and interest which said David W. Bouldin had on the 14th day of March, 1893, in the tract or parcel of land in dispute in the present action, and which said record and proceedings further showed that in pursuance of said judgment, the Sheriff of said Pima County did duly sell all of the right, title and interest which the said David W. Bouldin had in said tract of land aforesaid, to Wilbur H. King; that no redemption was made from said sale; that thereafter, the said sale was duly confirmed and a deed directed to be executed by the court having jurisdiction in said case, to Joseph E. Wise, as the successor in interest and grantee of said Wilbur H. King.

Counsel for defendants Bouldin also objected to the introduction in evidence by Joseph E. Wise, of the said judgment, record and proceedings, on the ground that the court rendering said judgment had no jurisdiction,

and that the judgment was void, that the levy was void, and that the confirmation of the sale was void, and generally, that no right, title or interest was conveyed under the sale made by said sheriff, or under the deed executed under any order of the court, or by any sheriff, or other officer. These objections were also sustained by the court, and the defendant Joseph E. Wise also assigns as error said ruling of the court so sustaining said objections of counsel for defendants Bouldin, for the reason that the court rendering said judgment had jurisdiction and the title conveyed by the sheriff was a good title, and the said judgment, record and proceedings were competent and material evidence, as hereinbefore more fully set forth.

The said record and proceedings were admitted in evidence subject to the objections of plaintiffs and defendants Bouldin, and thereafter, and after defendant Joseph E. Wise had rested his case, the court sustained the objections of plaintiffs and defendants Bouldin to the introduction of the evidence of said record, proceedings and judgment, to which ruling of the court due exception was taken.

IX

The court erred in sustaining the motion of plaintiffs to strike out all of the testimony of the defendant Joseph E. Wise as to his possession of any part of the tract or parcel of land in dispute, and particularly his testimony as to his adverse possession, and claim under adverse possession and prescription, to the following piece of land situate within the limits of the tract or parcel of

land described in the decree, to-wit: the east half (1-2) of the northwest quarter (1-4) and the west half (1-2) of the northeast quarter (1-4) of section thirty-five (35), township twenty-two (22) south, range 13 east, Gila and Salt River meridian, containing one hundred and sixty (160) acres.

X

The court erred in sustaining the motion of the plaintiffs and of the defendants Bouldin, to strike out the testimony, and admissions as to the testimony, of the defendant Lucia J. Wise, the grounds of said motion being that said evidence was immaterial and that no title or rights by adverse possession alone could be obtained as against any of the parties hereto as to the tract of land aforesaid, until December, 1914.

XI

This assignment of error is not urged.

XII

The court erred in overruling the objection of counsel for Joseph E. Wise and Lucia J. Wise, to the introduction in evidence by the defendants Bouldin, of each and all of the following deeds and instruments in writing, to-wit:

1. Deed from Powhatan W. Bouldin to Dr. M. A. Taylor, dated November 7, 1894, being Defendants Bouldins' Exhibit 1.

2. Sheriff's Certificate of Sale, Joseph B. Scott, Sheriff, to Lionel M. Jacobs, dated December 4, 1894,

being Defendants Bouldins' Exhibit 2.

3. Deed from Lionel M. Jacobs to M. A. Taylor, dated December 4, 1894, being Defendants Bouldins' Exhibit 3.

4. Deed from James E. Bouldin to M. A. Taylor, dated April 25, 1895, being Defendants Bouldins' Exhibit 4.

5. Deed from M. A. Taylor to Belle Bouldin, dated November 28, 1896, being Defendants Bouldins' Exhibit 5.

6. Deed from Daisy Belle Bouldin and James E. Bouldin to D. B. Gracy, dated April 16, 1900, being Defendants Bouldins' Exhibit 6.

7. Deed from D. B. Gracey to James E. Bouldin, dated June 15, 1904, being Defendants Bouldins' Exhibit 7.

The introduction of which said deeds was objected to on the ground that the same were immaterial and did not cover the property in controversy, for the reason that none of said grantors or parties mentioned in the said deeds and certificate of sale had any interest whatsoever in the tract or parcel of land described in the decree, and none of said deeds or said certificate of sale purported to convey the property in controversy, or the tract of land described in the decree, or any interest therein.

XIII

The court erred in permitting the plaintiffs to introduce in evidence, over the objections of the defendants Wise and Santa Cruz Development Company, an instrument in writing executed by John S. Watts to Wm. Wrightson, dated March 2, 1863, and being Plaintiffs' Exhibit L, for the reason that the same was irrelevant, incompetent and immaterial; that plaintiffs deraign no title under said instrument; and the said instrument could not be used to vary the description in the deed subsequently executed by said John S. Watts to Christopher E. Hawley; and there was no evidence showing that Christopher E. Hawley claimed or deraigned any interest or title under the said title bond aforesaid.

(Assignments of Error XIV, XV, XVI, XVII, XVIII and XIX are only applicable to the 1-19 interest inherited by the heirs of the son, Antonio Baca, and will be set forth and considered in our brief as to that 1-19 interest.)

XX

The court erred in adjudging and decreeing that until the tract or parcel of land described in said judgment and decree was segregated from the public domain of the United States, on or about the 14th day of December, 1914, no adverse possession or statutory prescription could commence to be initiated by any party to the action.

XXI

The court erred in adjudging and decreeing that the

defendant Joseph E. Wise was vested with an absolute fee simple title to no greater interest than an undivided 1-38 interest in the tract or parcel of land described in the decree; and in not adjudging and decreeing that there was vested in said Joseph E. Wise, in addition to the said 1-38 interest mentioned in said decree, a further interest, equal to 2-3 of an undivided 18-19 interest in the said tract or parcel of land, and in not quieting his title thereto.

XXII

The court erred in rendering its judgment and decree that the various recorded instruments, purporting to inure to the benefit of the said plaintiffs, or to the benefit of the said defendants Bouldin, or purporting to be in hostility to the title adjudicated in said decree in favor of the said plaintiffs, and of the said defendants Bouldin, or any or either of them, be removed as clouds; and in removing the same as clouds upon the title adjudicated to said plaintiffs, and to the said defendants Bouldin, and to each of them.

XXIII

That the court erred in said judgment and decree in ordering and adjudging "that the temporary injunction heretofore granted against Joseph E. Wise, as modified, be made permanent as to the south half of the tract or parcel of land in said judgment and decree described;" the said injunction as modified and so made permanent by said decree, enjoins and restrains the said Joseph E. Wise "from erecting and re-erecting fences in, upon or

around Baca Float No. 3, or any portion thereof, which would prevent or obstruct the said plaintiffs or their tenants from enjoying the use of said Float for grazing purposes, or which would prevent or obstruct free ingress or egress of the cattle of said plaintiffs, or their tenants, to and from the water or drinking places upon said Float, or prevent or obstruct the use of said water and land as heretofore used,, etc."

XXIV

Each and all of the errors hereinabove assigned by the said defendant Joseph E. Wise as errors affecting him and his interests and his rights, also equally affect the interests and rights of the defendants, Intervenors, M. I. Carpenter, Patrick C. Ireland, Ireland Graves. Anna R. Wilcox and Eldredge I. Hurt, heirs of John Ireland, deceased. These defendants do now further assign as error each and all of the above assignments of error, as errors also affecting the said defendants.

ARGUMENT.

Assignment of Error I.

The Court erred in decreeing plaintiffs, Cornelius C. Watts and Dabney C. T. Davis, Jr., to be vested with absolute title in fee to an undivided 18-19 interest in the south half of the tract of land in the decree described, and in quieting their title thereto.

As the plaintiffs alleged in their complaint that they are the owners of the tract of land in dispute in this action, and as this allegation is denied by the defendants, it was incumbent upon them to prove it.

It is well established that in an action to quiet title plaintiff must prove his title, and if he fails, is not entitled to a decree, no matter how weak or void may be the title of the defendants.

> "The burden is on plaintiff to establish that he himself has a perfect, legal or equitable title, without reference to and regardless of whether defendant's title be valid or invalid."
> 32 Cyc., 1369.

> "The rule in ejectment is that plaintiff must recover on the strength of his own title, and not on the weakness of the title of his adversary. A like rule obtains in an equitable action to remove a cloud from a title, and title in the complainant is of the essence of the right to relief."
> Dick vs. Foraker, 155 U. S., 404-416; 39 L. Ed., 201-206.

In the case of Frost vs. Spitley, 121 U. S. 552; 30 L. Ed., 1010, the court said:

> "Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon a title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possesison and legal title in the plaintiff."

Citing many other decisions of the U. S. Supreme Court.

Therefore, no matter how weak or invalid may be the asserted titles of the defendant, or any of them, if the plaintiffs in this case did not themselves have title to an undivided 18-19 interest in the south half of the tract of land in dispute, the decree is erroneous.

We will now show that plaintiffs did not own an undivided 18-19 interest in the south half of the tract of land in controversy.

The immediate deed under which plaintiffs claim their title to the lands described in the decree, is a deed executed to them by Samuel A. M. Syme, Laura G. Mathews, and other devisees and executors of the will of Alexander F. Mathews, of date February 8, 1907, being Plaintiff's Exhibit W, Tr. p. 214. If Syme and the heirs, devisees and executors of Alexander F. Mathews, did own the lands which they purported to

convey by the above deed, the deed is sufficient in form to have conveyed those lands.

But neither Syme, nor the heirs, devisees and executors of Mathews, were the owners of the lands which they so purported and attempted to convey.

In our statement of the facts of the case in this brief, we have said that, as to the piece of land we call "the overlap," being that portion of the tract described in the 1866 location, which overlaps the tract described in the 1863 location, the plaintiffs did have an undivided interest.

Hereafter, when we state that plaintiffs, or their grantors, had no interest whatsoever in any part of the tract described in the 1863 location, being the lands described in the decree, a reservation is to be understood as to their undivided interest in the overlap, as to which we concede their title; the amount of that interest will be hereafter shown.

Deed from Syme and Devisees, Etc., of Alexander F. Mathews, to Plaintiffs, Dated October 8, 1907, Plaintiffs' Exhibit W, Tr. p. 214.

In this deed Syme and the devisees, etc., of Mathews, purport to convey to the grantees, plaintiffs herein, the tract described in the 1863 location.

Deed from John C. Robinson to Samuel A. M. Syme, Dated April 30, 1896, Plaintiffs' Exhibit V, Tr. p. 213.

The only deed executed to Samuel A. Syme purporting to convey to him any interest in Baca Float No. 3, was a deed executed to him by John C. Robinson, April 30th, 1896, conveying to him the north half of the tract described in the 1866 location.

It is under this deed that Symes deraigns his title. In this deed Robinson, the grantor, quitclaims and conveys to Symes a tract of land with the following description:

> "all his right, title and interest, both in law and equity, in and to a certain tract or body of land, situate in Pima County, in the Territory of Arizona, containing some fifty thousand (50,000) acres, more or less, and described as follows:
>
> The upper or north one-half of the tract of land of some 100,000 acres, more or less, known as Baca Location or Baca Float No. 3, bounded as follows: Beginning at a point 6 miles 18 chains and 22 links, north of a point 3 miles west by south from the building known as the Hacienda de Santa Rita; thence from said beginning point north 6 miles 18 chains and 22 links; thence east 12 miles 36 chains and 14 links; thence south 6 miles, 18 chains and 22 links; thence west 12 miles 36 chains and 44 links, to the place of beginning." Tr. p.

Prior Deed from John C. Robinson to Powhatan W. Bouldin and James E. Bouldin, Dated November 19, 1892, Recorded December 27, 1892, Defendants Wise Exhibit 39, Tr. p.

Four years prior to the execution of the foregoing deed by Robinson to Syme, Robinson had executed a

deed conveying the same tract of land to Powhatan W. Bouldin and James E. Bouldin, Defendants Wise Exhibit 8, Tr. p. 255. Therefore, when Robinson executed his deed to Syme, Syme acquired nothing, for Robinson had theretofore conveyed the same land to the Bouldins. The description of the property conveyed by Robinson to Powhatan W. and James E. Bouldin, is as follows:

> "does hereby grant, assign, release and confirm to the parties of the second part, their heirs and assigns forever, one-half of the above described premises, bounded and described as follows, to-wit;
>
> Beginning at a point 6 miles, 18 chains and 22 links, north of a point 3 miles west by south from the building known as the Hacienda de Santa Rita; running thence north 6 miles, 18 chains and 22 links; running thence east 12 miles, 36 chains and 44 links; thence south 6 miles, 18 chains and 22 links; running thence west 12 miles, 36 chains and 44 lines to the place of beginning. **The said tract of land bounded and described in the sentence immediately foregoing this being the northern half of the tract known as Location No. three (3) of the Baca series."** Tr. p.

So whatever construction is placed upon the description contained in the deed from Robinson to Syme, the same construction must be placed upon the prior deed from Robinson to Powhatan W. and James E. Bouldin. And as the identical tract of land is described in both deeds, Syme acquired no title from Robinson, for Robinson had already conveyed the same, and by the same

description, under a prior recorded deed, to Powhatan W. and James E. Bouldin.

As the lower court did not decree plaintiffs to have any title to the north half of the 1863 location, it is unnecessary further to consider the deed from Syme to plaintiffs, except to say that under that deed plaintiffs acquired no title from said Syme.

The Deeds Under Which the Heirs and Executors of Alexander F. Mathews Deraigned Their Title.

No deed or deeds were executed by anyone to the widow, or heirs, or devisees, or executors, of Alexander F. Mathews. They only acquired, by descent or by will, such title as Alexander F. Mathews himself had at the time of his death.

It was stipulated by all the parties, as a fact, that Alexander F. Mathews was born on or about December, 1836; that he was married in 1866, and died December 10th, 1906, leaving a widow, Laura G. Mathews, and four adult children, to-wit: Mason Mathews, Charles G. Mathews, Elizabeth P. Mathews and Henry Mason Mathews. Tr. p. 149. The widow and children inherited whatever interest Alexander F. Mathews had at the time of his death in 1906; and this was the interest they conveyed to plaintiffs. We will now show that Alexander F. Mathews himself had no interest in the tract described in the 1863 location.

Deeds Executed to Alexander F. Mathews.

Seven deeds were executed to Alexander F. Mathews in his lifetime, and no more, being as follows:

(1) Deed from John C. Robinson to Alexander F. Mathews, dated September 22, 1893, Plaintiffs' Exhibit U, Tr. p. 210.

(2) Deed from John W. Cameron and Mrs. A. T. Belknap to Alexander F. Mathews, dated September 22, 1893, Plaintiffs' Exhibit Z, Tr. p. 221.

(3) Deed from John W. Cameron to Alexander F. Mathews, dated September 22, 1893, Plaintiffs' Exhibit AA, Tr. p. 223.

(4) Deed from James Eldredge to Alexander F. Mathews, dated September 22, 1893, Plaintiffs' Exhibit CC, Tr. p. 226.

(5) Deed from Charles A. Eldredge to Alexander F. Mathews, dated September 22, 1893, Plaintiffs' Exhibit DD, Tr. p. 226.

(6) Deed from Powhatan W. Bouldin and wife and James E. Bouldin to Alexander F. Mathews, dated February 7, 1894, Plaintiffs' Exhibit EE, Tr. p. 229.

(7) Deed from John Ireland and Wilbur H. King to Alexander F. Mathews, dated February 23, 1894, Plaintiffs' Exhibit Y, Tr. p. 219.

Before quoting the description of the lands conveyed in each of these seven deeds, it is necessary to explain that prior to the execution thereof, to-wit, on December 1, 1892, the John C. Robinson, above named, had executed a deed to the John W. Cameron, above named,

conveying to him the southern half of the lands described in the 1866 location, Defendants Wise Exhibit 8, Tr. p. 255. In regard to which lands, Cameron, on November 28, 1892, had executed a declaration of trust, Plaintiffs' Exhibit DD, Tr. p. 226, in which, amongst other things, he declared that upon a sale of said lands he would pay the proceeds thereof in certain proportion to John C. Robinson, Mrs. A. T. Belknap, Charles A. Eldredge and James Eldredge, retaining a certain amount for himself.

After the execution by Robinson of the above mentioned deed to Cameron, and the execution of the declaration of trust aforesaid, Cameron, Robinson, Mrs. Belknap and the two Eldredges executed the deeds above tabulated, being deeds 1, 2, 3, 4 and 5, to Alexander F. Mathews, wherein they all conveyed to him their legal and equitable interests in the lands in said deeds described. These five deeds are as follows:

Deed (1) John C. Robinson to Alexander F. Mathews, September 22, 1893, Plaintiffs' Exhibit U, Tr. p. 210.

In this deed, being the first one of the above mentioned deeds executed to Alexander F. Mathews, there is the following recital:

> "Whereas, the said John C. Robinson, by deed dated December 1, 1892, and recorded in the office of the County Recorder of Pima County, Arizona Territory, did convey to John W. Cameron of Washington, D. C., a certain tract of land in said County and Territory, which is described as follows,

viz: That certain tract of land which is the southern half of that tract of land known as Baca Float No. 3, containing 100,000 acres, more or less, the said southern half thereby conveyed by said Robinson to said Cameron containing 50,000 acres more or less, and is bounded as follows, viz: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north six miles, eighteen chains and twenty-two links, thence east twelve miles thirty-six chains and forty-four links, thence south six miles, eighteen chains and twenty-two links, thence west twelve miles, thirty-six chains and forty-four links, to the beginning, together with all the tenements and appurtenances thereunto belonging; and whereas, by virtue of and as appears by a certain declaration of trust executed by the said John W. Cameron, dated the 28th day of November, 1892, and recorded in said office, and especially by the fourth (4th) section or paragraph of said declaration of trust, I am entitled to have and recover and to have paid to me by the said Cameron ten (10) per centum of the money to be realized net by said Cameron from the sale of said land when by him sold."

Then follows in the deed the following conveyance:

"I, the said John C. Robinson, the party of the first part, do hereby grant and convey and assign to the said Alex. F. Mathews, without any recourse upon me whatsoever, all of my right, title and interest in and to said land above described, and to the net proceeds thereof, by virtue of the said declaration of trust or otherwise, and I do hereby authorize the said John W. Cameron to convey and grant the said

above described tract of land of 50,000 in Pima County, Arizona Territory, to the said Alex. F. Mathews, free from any and all claims, demands and interest on my part therein, or in the net proceeds thereof, in and under the said declaration of trust, or in any manner, in any way or upon any ground whatever." Tr. p. 210.

Deed (2) John W. Cameron and Mrs. A. T. Belknap to Alexander F. Mathews, Dated September 22, 1893, Plaintiffs' Exhibit Z, Tr. p. 220.

This deed contains the same recital and the same words of conveyance as the deed from Robinson to Mathews above quoted, and need not be repeated.

Deed (4) James Eldredge to Alexander F. Mathews, dated September 22, 1893, and

Deed (5) Charles A. Eldredge to Alexander F. Mathews, dated December 22, 1893, also contain the identical recital and the same words of conveyance, except as to the name of the grantor, as the foregoing deed from Robinson to Mathews, and above quoted, and need not be repeated. Tr. pp. 223-226.

Deed (3) John W. Cameron to Alexander F. Mathews, Dated September 25, 1893.

In pursuance of the foregoing deeds and authorizations, John W. Cameron executed to Alexander F. Mathews, a deed dated September 25, 1893, Plaintiffs' Exhibit AA, Tr. p. 223, wherein he conveyed to

Mathews the south half of the lands described in the 1866 location, the description thereof in the deed being as follows;

> "that certain tract of land situated in Pima County, in Arizona Territory, which is the southern one-half of the tract of land known as Baca Float No. 3, containing one hundred thousand (100,000) acres more or less, which said southern half hereby conveyed contains fifty thousand (50,000) acres more or less, and is bounded as follows, viz: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, thence north six miles, eighteen chains and twenty-two links; thence east twelve miles, thirty-six chains and forty-four links; thence south six miles, eighteen chains twenty-two links; thence six miles, twelve miles, thirty-six chains and forty-four links to the beginning." Tr. p. 223.

Deed (6) Powhatan W. Bouldin and Wife and James E. F. Mathews, February 23, 1894, Plaintiffs' Exhibit Exhibit EE, Tr. p. 229.

In this deed Powhatan W. Bouldin and wife and James E. Bouldin convey to Mathews the southern half of the tract described in the 1866 location, by a description identical with that in the foregoing five deeds, the description in their deed being as follows:

> "That certain tract of land situated in Pima County, in Arizona Territory, which is the southern one-half of the tract of land known as Baca Float No. 3, containing one hundred thousand (100,000) acres,

more or less, which said southern half hereby conveyed contains fifty thousand (50,000) acres, more or less, and is bounded as follows, viz: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, thence north six miles, eighteen chains and twenty-two links; thence east twelve miles, thirty-six chains and forty-four links; thence south six miles, eightee chains twenty-two links; thence west twelve miles, thirty-six chains and forty-four links, to the beginning." Tr. p. 229.

Deed (7) John Ireland and Wilbur H. King to Alexander F. Mathews, February 2, 1894, Plaintiffs' Exhibit Y, Tr. p. 219.

In this deed, also, the grantors, Ireland and King, convey to Alexander F. Mathews, all their interest in the southern half of the tract described in the 1866 location, by a description identical with that in the foregoing six deeds, the description in the deed being as follows:

"the following described tract or parcel of land in said County and Territory, viz: The southern one-half of the tract of land known as Baca Float No. 3, containing one hundred thousand (100,000) acres, more or less, which said southern half hereby conveyed, released and quitclaimed contains fifty thousand (50,000) acres more or less, and is bounded as follows, viz: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, thence north six miles, eighteen chains and twenty-two links; thence east twelve miles, thirty-six chains and forty-four links; thnce south six miles, eighteen chains and

twenty-two links; thence west twelve miles, thirty-six chains and forty-four links to the beginning." Tr. p. 219.

It will be seen that the description of the tract of land conveyed to Alexander F. Mathews in each and all of the seven foregoing deeds, and being all of the deeds under which he deraigned any title, is identical. In each of these deeds the respective grantors convey:

> **"the southern one-half of the tract of land known as Baca Float No. 3,** containing 100,000 acres more or less, which said southern half hereby conveyed contains 50,000 acres more or less, and is bounded as follows, viz:
>
> Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, thence north 6 miles, 18 chains and 22 links——"

Here arises a question of fact which must first be determined before the foregoing description, or the description in any of the seven mentioned deeds, can be intelligently considered, namely—

What tract of land was known as "Baca Float No. 3," in the years 1893-4, when said deeds to Mathews were executed? Was it Tract 1 on our diagram, the 1863 location; or was it Tract 2, the tract described in the 1866 location?

The answer to this question requires a consideration of the following five facts, to-wit:

1. Alexander F. Mathews himself, the grantee in the

deeds, declared that Baca Float No. 3 was the tract of land described in the 1866 location, Tract 2 on the diagram.

2. In 1887, the tract described in the 1866 location was marked upon the ground, monuments were erected at each corner thereof, and monuments were erected along each side line thereof, so that its boundaries could be readily traced.

3. In 1887, the tract described in the 1866 location was surveyed by George J. Roskruge, the County Surveyor of Pima County, who erected the monuments above mentioned; he made a plat of his survey and filed it as a public record in his office as County Surveyor of Pima County, on which plat the tract is designated "Baca Float No. 3;" he filed a more elaborate map of his survey in the office of the United States Surveyor General of Arizona, about the same time, on which map the tract is designated, "Baca Float No. 3;" and in 1893 the tract so monumented and surveyed, was designated on the official map of Pima County as, "Baca Float No. 3," being the Tract 2 on the diagram.

4. The tract described in the 1866 location was known by the people generally as "Baca Float No. 3," and was the only tract known by that name.

5. The lands within the limits of the 1863 location were not known by the name of "Baca Float No. 3," but were known as the Tumacacori and Calabasas land grants, and the land outside of these grants had no name.

First. Alexander F. Mathews, on March 1, 1903, in the matter of his petition to the Secretary of the Interior, seeking for a rescission of the decision rendered by the Secretary in July, 1899, which held the 1866 location to be invalid, stated in language as clear and strong as words could make it, that the land known as "Baca Float No. 3" was the tract of land described in the 1866 location, Tract 2 on our diagram. In this petition Alexander F. Mathews says:

> "From the 21st day of May, 1866, when the Commissioner of the General Land office allowed the amended description, to the 25th day of July, 1899, when the decision complained of was made, no one, within or without the department, ever appears to have questioned the validity of the allowance of the 'amended description.' And the Department itself, in the decision of Secretary Lamar, of date June 15, 1887, held that 'the claimant must be held to this selection and location,' as under amended description. **The land so described was understood to be "Baca Float No. 3."** Tr. p. 394.

Again, Mathews in this petition further says:

> "The land described in the 'amended description' was considered by the Government as private land, and passed from grantee to grantee for large considerations, as Baca Float No. 3, and **there was no thought or question that any other portion of the earth was Baca Float No. 3, in law or in fact."** Tr. p. 394.

Three years after Alexander F. Mathews made this strong and positive declaration as to what particular

tract of land was known by the name of "Baca Float No. 3," he died. There is no evidence that he ever made any other, different or contrary declaration.

But, within a year after his death, his heirs, ignoring the declaration of their ancestor, claimed that "Baca Float No. 3" was not the tract described in the 1866 location, Tract 2 on the diagram, but was the tract of land described in the 1863 location, being Tract 1 on the diagram, and they conveyed the 1863 location to plaintiffs, calling it "Baca Float No. 3."

And plaintiffs are urging this court to find as a fact, that the tract of land known as "Baca Float No. 3," was the tract of land described in the 1863 location, Tract 1 on our diagram, in face of the fact that Alexander F. Mathews himself, under whose heirs plaintiffs deraign their title, declared in his lifetime that the only tract of land known by the name of "Baca Float No. 3" up to July, 1899, when the Secretary of the Interior declared the 1866 location invalid, was the same and identical tract of land described in the 1866 location, Tract 2 on our diagram.

Second. George J. Roskruge testified as a witness in the case, that in the year 1887, and thereafter, he was County Surveyor of Pima County, Arizona; that David W. Bouldin, Sr., employed him to make a survey of "Baca Float No. 3," in the summer of 1887, which he did, and that the survey he made was in accordance with the description of the 1866 location. He went to the place called Hacienda de Santa Rita and commenced his

survey from that beginning point. He saw Morgan R. Wise, father of the appellant, Joseph E. Wise, who was living there at that time. Roskruge ran his lines according to the courses and distances of the 1866 location, erecting monuments as he went along, putting up monuments all along the line, so that they could be seen one from the other, so that if the land was ever fenced, there would be no trouble in fencing it. At each corner he erected large monuments. (Testimony of Roskruge, Tr. pp. 233-248.) This tract of land so surveyed and monumented on the ground, was known and called "Baca Float No. 3," being Tract 2 on our diagram.

Third. Not only was the tract of land described in the 1866 location so monumented and marked on the ground, in the year 1887, but Roskruge further testified that he made a map of this survey, Tr. p. 235 (Defendants Wise Exhibit "I," transmitted with the record in this case). This map, which is an elaborate topographical map of the Roskruge survey, shows the tract according to the 1866 description, and on this map this tract is named **"Baca Float No. 3."**

Roskruge also filed, as a record in his office of County Surveyor, a more simple plat of his survey, a copy of which plat is set forth in the transcript as Defendants Wise Exhibit 2, Tr. p. 238. He placed this plat on record, as he testified, because Bouldin wanted to have it on record, as he was the County Surveyor, and next in authority after the Government. Tr. p. 235.

The law in force in Arizona at that time provided that

it should be the duty of the County Surveyor to make any survey at the application of any person, and to keep a fair record of all surveys made by him in his office. The section is as follows:

> "562. The Surveyor must make any survey that may be required by order of the court, or upon application of any person, keep a correct and fair record of all surveys made by him, number them in the order made progressively, and preserve a copy of the field notes and calculations of each survey, endorse thereon its proper number, a copy of which, and a fair and correct plat, together with the certificate of survey, must be furnished by him to any person upon payment of the fees allowed by law."
>
> Rev. Stats. of Ariz. of 1887, Par. 562.

And on this plat, so filed by Roskruge in his office of County Surveyor, the tract of land described in the 1866 location is designated and called **"Baca Float No. 3,"** being Tract 2 on our diagram.

A map of the survey of Baca Float No. 3, as made by Mr. Roskruge, being the same as the elaborate topographical map before referred to, was also filed in the office of the Surveyor General of the United States, being the survey according to the 1866 description, and on this map the tract of land is called **"Baca Float No. 3."** This map is Defendants Wise Exhibit 6, and has also been sent up as an original record in the case.

In the years 1890-1-2-3 Roskruge was employed to make a map of Pima County, which he did. This map,

by resolution of the Board of Supervisors of Pima County of July 22, 1893, was adopted as the official map of Pima County. A photographic copy of this map was introduced in evidence as "Defendants Wise Exhibit 3," and this map also is sent up with the record in this case for the consideration of this court.

On this official county map are delineated the private land claims or Mexican grants, Indian Reservations, etc., and amongst other tracts of land, is delineated the out boundaries of the tract of land described in the 1866 location; and this tract of land is marked on the map, **Baca Float No. 3,** being Tract 2 on our diagram.

So that, not only in the office of the County Surveyor of Pima County, and in the office of the U. S. Surveyor General of Arizona, were maps filed which showed the tract of land then known and called by the name of "Baca Float No. 3;" but the tract known by that name was also marked and delineated upon the official map of Pima County. And the tract of land so denominated and named "Baca Float No. 3," was the identical tract of land described in the 1866 location, being Tract 2, on our diagram.

Fourth. Roskruge further testified that he first heard of Baca Float No. 3 in the early 70's, when he was in the Surveyor General's office, and that from that time up to the year 1899, Baca Float No. 3 was supposed to be about where he surveyed it in 1887. Tr. p. 247.

Fifth. Now, the tract of land described in the 1863 location was not known by the name of "Baca Float No.

3" prior to the decision of the Secretary of the Interior in 1899, when the 1866 location was declared invalid; but, so far as any part of the 1863 location had a name at all, it was known and called "Tumacacori and Calabasas Grant."

Referring now to the map, Defendants Wise Exhibit 34, Tr. p. 379, which shows the relative positions of the 1863 and 1866 locations, there will be seen delineated within the boundaries of the 1863 location, two tracts of land in the valley of the Santa Cruz river, which on that map are designated as the "Tumacacori and Calabasas Grants."

In 1880 the Surveyor General of Arizona caused an official survey of those two grants to be made, being claimed Mexican land grants, and an official map was made of the survey, which in that year was filed in his office as a public record. The map of this survey is defendants Wise Exhibit 5, the original of which has been transmitted to this court with the record in this case. This map of survey shows that what is now, and since 1899 has been, called "Baca Float No. 3," was then, so far as it had a name at all, called "Tumacacori and Calabasas Grants."

In 1879, John Curry and C. P. Sykes, who claimed to be the owners of the Tumacacori and Calabasas grants, filed their petitions with the Surveyor General of Arizona, wherein they prayed for confirmation of their title to said lands. In this petition, amongst other things, they said:

"that they are the owners, under various mesne conveyances from the original grantees and denouncers, of a certain tract of land, or Rancho, situate in the County of Pima and the Territory of Arizona, known by the name of "Tumacacori" and "Las Calabasas," a particular description of the location and boundaries of which tract of land or Rancho is clearly and explicitly given in the original expediente of the title....

....whereupon the lands now claimed by your petitioners were denounced and purchased by Don Francisco A. Aguilar, and that they have been owned and possessed by the said Aguilar and his successors from the date of said denouncement down to the present time; and that the possession thereof during this time has been continuous, save when unavoidably prevented by the hostility of the neighboring savages, and your petitioners, under their purchase aforesaid, are now in possession and useful occupation of the said lands; having expended large sums of money in the development and improvement thereof." Defendants Wise Exhibit 4, Tr. p. 241.

After the creating of the Court of Private Land Claims, by Act of Congress of March 3, 1891, the claimants of the Tumacacori and Calabasas grants presented to that court their petition for a confirmation thereof. That court held the grants to be invalid, which judgment was thereafter affirmed by the Supreme Court of the United States, in the case of Taxon vs. U. S., 171 U. S., 224-260.

But, up to the time of this decision in 1898, the tracts of land, so situate in the valley of the Santa Cruz river,

within the limits of the boundaries described in the 1863 Baca location, were known and called the "Tumacacori and Calabasas Grants." And those lands were not known by the name of "Baca Float No. 3" at all, until 1899 and thereafter.

The witness George J. Roskruge testified that, in 1880, when the map of the Calabasas and Tumacacori Grants was made by the U. S. Surveyor General, he was in the U. S. Surveyor General's office, and himself made the map. He further testified he knew where those grants were, and he further testified:

> "The lands which were included within this survey" (survey of the Tumacacori and Calabasas Grants) "were not at any time prior to the year 1899, known by the name of 'Baca Float No. 3.' The name of those lands included within the limits shown on this map as Calabasas and Tumacacori were known as Calabasas and Tumacacori Land Grants, and they were in the valley of the Santa Cruz. . . .
>
> "I first heard of Baca Float No. 3 some time in the early 70's, when I was in the Surveyor General's office; that was in 1870; from that time up to the year 1899 Baca Float No. 3 was always supposed to be in the Santa Rita mountains; I never heard of its being located anywhere but in that district." Tr. pp. 247-248.

The foregoing facts, which are in evidence in this case, and which are not disputed by any witness, show conclusively, that the tract of land known as "Baca Float

No. 3," in the years 1893 and 1894, when each and all of the deeds to Alexander F. Mathews, before enumerated, were executed, was the tract of land dscribed in the 1866 location, and no other tract whatsoever.

The answer then, to the question, "What lands were known by the name of 'Baca Float No. 3,' in the years 1893 and 1894, when the seven deeds above enumerated were executed to Alexander F. Mathews?" as answered by all the evidence in this case, is, **The lands described in the 1866 location.**

This fact being ascertained, we again call attention to the description of the tract of land in each of the seven deeds to Alexander F. Mathews, and ask the court to read that description. It is as follows:

> "the southern one-half of the tract of land known as Baca Float No. 3, containing 100,000 acres more or less, which said southern half hereby conveyed contains 50,000 acres more or less, and is bounded as follows, viz:
>
> "Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, thence north 6 miles, 18 chains and 22 links; thence east 12 miles 36 chains and 44 links; thence south six miles, 18 chains and 22 links; thence west 12 miles, 36 chains and 44 links, to the place of beginning."

The southern half of the tract known and called at that time "Baca Float No. 3" **was** the tract that was bounded and described as beginning at a point 3 miles

west by south from the Hacienda de Santa Rita, and running thence the courses and distances as called for in each of the seven deeds. This tract was the tract described in the 1866 location; the tract which Roskruge surveyed and which was platted on the maps. It was the southern half of this tract that was conveyed to Alexander F. Mathews, by a description clear, perfect and unambiguous.

The trial court made no finding of fact as to what specific tract of land was known by the name of "Baca Float No. 3," between the years 1866 and 1899, or at all. Nor did the lower court make or file any opinion in this case which would advise counsel upon what theory, or by what process of reasoning, it arrived at the conclusion that the description in each of the seven deeds to Mathews, hereinabove considered, and which specifically conveyed to him the south half of Tract 2, vested his heirs, devisees and executors with title to the south half of Tract 1.

If the tract known as "Baca Float No. 3," in the years 1893 and 1894, had been Tract 1, the piece of land described in the 1863 location; if that tract had been surveyed, monumented on the ground, and official maps made of it whereon it was delineated and named "Baca Float No. 3," as had been done with Tract 2, then plaintiffs (appellees) might invoke the rule that when a tract is conveyed by name followed by a specific description of its boundaries, a variance between the tract so named and the boundaries given, is to be decided in favor of the tract known by the specific name.

This was the rule in the case of Lodg's Lessee vs. Lee, 6 Cranch, 237-8; 3 L. Ed. 2110, where an island in the Potomac river, known by the name of "Eden," was conveyed, and the boundaries of the island also were given in the deed. It was held that all the island was conveyed.

But in that case the grantee under the deed did not pretend that at the time his deed was made, an entirely half of the tract of land known as 'Baca Float No. 3," different island was known by the name of "Eden," to which the specific boundaries given could not possibly apply; and he made no claim that his deed covered this other island.

He claimed, and the court decided, that as the deed conveyed all the island known as "Eden," all of the island was conveyed, although the specific description by the courses and distances given, did not include all the island.

But in the case at bar, there is no variance whatsoever in the description contained in each of the seven deeds to Mathews. In each deed there is conveyed to him the south half of the tract of land known as "Baca Float No. 3," said south half being described as follows: and then follows an accurate and perfect description, by courses and distances, of the tract of land which **was** known and called "Baca Float No. 3," at the time when each of said deeds was executed, being the description of the 1866 location. There is no variance of description in any of those seven deeds. There is nothing to be construed.

A question of fact is to be determined, namely, "What tract of land was known by the name of 'Baca Float No. 3,' in the years 1893 and 1894, when those seven deeds were executed?"

But it being determined, as it must be, from the undisputed evidence in the case, that the tract known and called by that name, in the years mentioned, was the tract described in the 1866 location, being Tract 2 on our diagram, and it being further ascertained and determined, that the south half of the tract known as "Baca Float No. 3," at the time, was the tract specifically described by the courses and distances as given in each of said seven deeds; then it must follow that the descriptions in each of these deeds is perfect; there is no variance in any of them; there is nothing to be construed; the tract of land conveyed by each of these deeds is exactly what each of the deeds states it to be.

If then, as we maintain, the only lands conveyed to Alexander F. Mathews by the seven deeds aforesaid (and he deraigns his title under no other deeds), is the south half of the tract described in the 1866 location, Tract 2 on our diagram, the court erred in decreeing that plaintiffs, grantees under a deed from the heirs, devisees and executors of Mathews, acquired an 18-19 interest in the south half of the tract described in the 1863 location, Tract 1 on our diagram, an entirely different tract of land.

The tract of land conveyed in each of the seven deeds to Alexander F. Mathews is described as follows:

> "The southern one-half of the tract of land known as Baca Float No. 3, containing 100,000 acres more or less, which said southern half hereby conveyed contains 50,000 acres more or less, and is bounded as follows, viz: Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, thence north.... thence east.... thence south.... thence west....to the place of beginning."

The tract of land described in the decree herein, to which the trial court adjudged plaintiffs to be the owners of an undivided 18-19 interest therein, is in said decree described as follows:

> "Commencing at a point one mile and a half from the base of the Salero mountain in a direction north 45° east of the highest point of said mountain, running thence from said beginning point west.... thence south.... thence east.... thence west ....to the place of beginning, etc." Tr. p. 536.

The initial point of each of the descriptions is different; the lines are run by different courses; and they are entirely different tracts of land, all of which is plainly shown on the diagram of the two tracts.

We therefore submit, that as plaintiffs deraign their title under the seven deeds to Mathews, and as none of these deeds to Mathews convey to him the tract of land described in the decree; the lower court erred in adjudging plaintiffs to be the owners of 18-19 interest in the tract so described in the decree; and erred in quieting their title thereto.

Further Consideration of Assignment of Error I.

Not only did Alexander F. Mathews himself not own the southern half of the tract described in the 1863 location, as shown in the preceding consideration of the deeds executed to him, but the respective grantors in those deeds did not themselves own that tract.

The grantors of Alexander F. Mathews, under the seven deeds heretofore considered, were:

John C. Robinson,

John W. Cameron,

Mrs. A. T. Belknap,

James Eldredge,

Charles Eldredge,

Powhatan W. Bouldin and wife and James Eldredge,

John Ireland and Wilbur H. King.

All of the above named grantors, except John Ireland and Wilbur H. King, derived their title from John C. Robinson, as heretofore shown.

The title which John Ireland and Wilbur H. King had acquired, on February 23, 1894, the date of their deed to Mathews, was under a deed of date February 21, 1885, executed to them by David W. Bouldin, Sr., wherein he conveyed to them an undivided 1-9 of the undivided 2-3 interest which he had acquired from the heirs of Watts in the 1863 location. We therefore concede that John Ireland and Wilbur H. King, at the date

they executed their aforesaid deed to Mathews, did have an undivided 1-9 of 2-3, equal to 2-27, interest in whatever interest David W. Bouldin, Sr., acquired from the heirs of John S. Watts. What that interest was will be hereafter considered. But Ireland and King did not own an undivided 18-19 interest in either tract, and could not convey any such interest to Mathews.

Now, as to John C. Robinson, under whom all of the other above named parties deraigned their title. He deraigned his title under a deed executed to him by Christopher E. Hawley, of date May 5, 1884, Plaintiffs' Exhibit T, Tr. p. 208; and also under a deed executed to him by Powhatan W. Bouldin and James E. Bouldin, of date November 12, 1892, Plaintiffs' Exhibit X, Tr. p. 216.

We will consider the description of the property conveyed in each of these two deeds to Robinson.

In the deed from Powhatan W. Bouldin and wife and James E. Bouldin to John C. Robinson, dated November 12, 1892, the property therein conveyed is described as follows:

> "Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north 6 miles, 18 chains and 22 links; running thence east 12 miles, 36 chains and 44 links; running thence south 6 miles, 18 chains and 22 links; thence west 12 miles, 36 chains and 44 links to the place of beginning. **The said tract of land bounded and described in the sen-**

tence immediately foregoing this being the southern half of the tract known as location No. 3 of the Baca series." Plaintiffs' Exhibit X, Tr. pp. 216-219.

It will be observed that in the foregoing description the tract of land is not called "Baca Float No. 3." In this regard the description is different from the seven deeds made to Alexander F. Mathews, heretofore considered. But the grantors therein declare that the lands therein described, with the beginning point 3 miles west by south from the building known as the Hacienda de Santa Rita, **is the tract of land known as "Location No. 3 of the Baca series."**

There is no ambiguity in the description of this tract of land; for the grantors specifically state what they mean by the tract of land known as "Location No. 3 of the Baca series;" and they say it is the particular tract of land that is bounded and described in the sentence immediately foregoing, namely, the tract described in the 1866 location.

Under no possible or conceivable rule of construction could the lands described in the foregoing deed be held to cover any other tract of land than the specific tract therein described, as beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, and running thence, etc., being the description of the specific tract of land described in the 1866 location. Therefore, John C. Robinson did not acquire any interest in the tract of land described in the 1863 location, under and by virtue of this deed.

Deed from Christopher E. Hawley to John C. Robinson, May 5, 1884.

In the deed from Christopher E. Hawley to John C. Robinson, of date May 5, 1884, the lands therein conveyed are thus desribed:

> "all the right, title and interest, whatever the same may be, in and to that certain tract of land situate, lying and being in the Santa Rita mountains, in the Territory of Arizona, containing 100,000 acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca, by the United States, and by said heirs conveyed to John Watts, of the Territory of New Mexico, by deed dated on the 1st day of May, A. D. 1864, and by said Watts conveyed to the said Christopher E. Hawley, by deed dated on the 8th day of January, A. D. 1870, bounded and described as follows;
>
> "Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence north 12 miles, 36 chains and 44 links; running thence east 12 miles, 36 chains and 44 links; running thence south 12 miles, 36 chains and 44 links; running thence west 12 miles, 36 chains and 44 links, to the place of beginning, the said tract of land being known as location No. 3 of the Baca series."
>
> Plaintiffs' Exhibit T, Tr. pp. 208-210.

There is a reference in the foregoing description to the deed executed by John S. Watts to Christopher E. Hawley, as being the source of Hawley's title. This is

true, for no other deed than the deed from Watts, was ever executed by any one to Hawley.

Deed from John S. Watts to Christopher E. Hawley, January 8, 1870, Plaintiffs' Exhibit N, Tr. p. 193.

The description of the tract conveyed in the deed from Watts to Hawley, referred to in the deed from Hawley to Robinson, is as follows:

> "all that certain tract, piece or parcel of land, lying and being in the Santa Rita mountains, in the Territory of Arizona, U. S. A., containing 100,000 acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca, by the United States, and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D., 1864, bounded and described as follows:
>
> "Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence north 12 miles, 36 chains and 44 links, running thence east 12 miles, 36 chains and 44 links; thence south 12 miles, 36 chains and 44 links; thence west 12 miles, 36 chains and 44 links, to the place of beginning; the said tract of land being known as Location No. 3 of the Baca series." Plaintiffs' Exhibit N, Tr. pp. 193-197.

This description is identical with the description in the deed from Hawley to Robinson; therefore, whatever tract of land was remised, released and quitclaimed by the Watts deed to Hawley, that same land was by Hawley conveyed to Robinson. Here, then, arises the question: What tract was quitclaimed by Watts to Hawley?

For the same tract of land, by identical description, was conveyed by Hawley to Robinson. Was it the tract of land therein specifically bounded and described, with begining point at the Hacienda de Santa Rita, and thence running the courses and distances as therein set forth, being the tract described in the 1866 location, Tract 2 on our diagram; or was it some other tract of land, with different beginning point and different courses and distances, as claimed by plaintiffs and defendants Bouldin, appellees herein.

We will analyze each recital of this description; we will consider all the facts as they existed when this deed was made, so far as those facts are disclosed by the evidence in this case; we will consider the acts and declarations of Hawley himself upon his one and only visit to the tract, in 1875 , and we will show that it was the intention of the parties to describe the tract of land described in the 1866 location, being the tract which, as a fact, is actually described by metes and bounds in the deed itself.

And we will further show, that under this deed, Hawley only acquired such interest as John S. Watts then had to the tract of land described therein, being the same tract of land described in the 1866 location; and that he acquired no interest in any other tract of land whatsoever.

The description of the tract of land quitclaimed by Watts to Hawley, as above set forth, is contained in one sentence, composed of six recitals or clauses, as follows:

(1) All that certain tract, piece or parcel of land, **lying and being in the Santa Rita mountains,** in the Territory of Arizona, U. S. A.,

(2) containing 100,000 acres, be the same more or less,

(3) granted to the heirs of Luis Maria Cabeza de Baca by the United States,

(4) and by said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D. 1864,

(5) bounded and described as follows: Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence north 12 miles, 36 chains and 44 links; running thence east 12 miles 36 chains and 44 links; thence south 12 miles, 36 chains and 44 links; thence west 12 miles, 36 chains and 44 links, to the point or place of beginning,

(6) the said tract of land being known as Location No. 3 of the Baca series. Tr. p. 194.

We will consider each of the foregoing clauses or recitals in detail.

(1) The tract is described as a **certain** tract, piece or parcel of land; not an indefinite tract, piece or parcel of land; and it is a certain tract of land **situate in the Santa Rita mountains,** Territory of Arizona.... "bounded and described as follows: Beginning at a point 3 miles west by south from the building known

as the Hacienda de Santa Rita, running thence north," etc., being the identical description of the tract as located in the 1866 location.

In the center of the tract so described, is a mountain over 9,000 feet high, called Mt. Wrightson, or Old Baldy. (See topographical map made by Roskruge, Defendants Wise Exhibit 1 and Exhibit 6, also map of Pima County, Exhibit 3, and map of the two locations, Wise Exhibit 34.)

From the window in the court room of the U. S. District Court in Tucson, when this case was tried, this mountain could be seen, a distance of 45 miles away; a land mark unmistakable. Roskruge, a witness on the stand, testified:

> "Looking south from this court house, a distance of about 45 miles, you see a peak something over 9,000 feet high, in the Santa Rita mountains; I know the name of that peak; its name is Mt. Wrightson, or Old Baldy; that mountain is platted upon the map that I made, Defendants Wise Exhibit 1, as Mt. Wrightson....; now in regard to this location Baca Float No. 3 that I surveyed; it takes in both slopes of the Santa Rita mountains; it takes in very little but mountains and foothills." Tr. p. 239.

The tract which Roskruge had theretofore surveyed was the tract described in the 1866 location; the same tract described in the Watts-Hawley deed.

An inspection of the official map of the tract described

in the 1863 location, the map made by Philip Contzen, under the order of the U. S. Surveyer General of Arizona, approved by the Secretary of the Interior, and now on file in the General Land Office, being Plaintiffs' Exhibit Q, sent up with the record, shows that the Santa Cruz river runs from north to south through the entire 1863 location. The eastern limits of this tract terminate in the foothills of the Santa Rita mountains; but not in the mountains themselves. This tract, the 1863 location, is essentially in the valley of the Santa Cruz. On this point the witness Philip Contzen, who made this official survey, testified:

> "Q. Are you acquainted with the range known as the Santa Rita mountains? Yes sir, I am.
>
> "Q. Now, the range known by that name, does that survey of the 1863 location take in the Santa Rita mountains? A. It does not, only portions of the southern slope, or rather the southwestern slope, of the Santa Rita mountains, near the Salero hill.
>
> "Q. But the mountains known as the Santa Ritas proper, not the foothills of the mountains, but the mountains themselves, are they within the '63 location as surveyed by you? A. They are not."
>
> Tr. pp. 378-382.

He further testified:

> "On my official map (Exhibit 34) there are platted in, the Tumacacori and Calabasas; those names

are the names of certain land grants that existed at that time, or before, along the Santa Cruz valley—Mexican land grants.

"Q. What kind of land did those two grants take in, in regard to their being valley or mountain lands? A. Principally valley lands."

Tr. pp. 378-382.

Therefore, as the tract which was quitclaimed by Watts to Hawley, was specifically described as a certain tract of land, **situate in the Santa Rita mountains,** that description could not cover a tract of land that was not situate in the mountains at all, but was situate in the valley of the Santa Cruz. The tract of land described in the 1866 location **is** situate in the Santa Rita mountains; the tract described in the 1863 location is in the valley of the Santa Cruz.

This clause in the description in the Hawley deed can only apply to the 1866 location.

(2) The next recital is: "containing 100,000 acres, be the same more or less." This applies to both tracts of land, for each contains about 100,000 acres.

(3) The next recital is: "granted to the heirs of Luis Maria Cabeza de Baca by the United States." This recital was correct, according to the facts as understood in 1870, when the Watts-Hawley deed was executed.

As heretofore said, in our statement of the facts of the case, John S. Watts, as attorney for the Baca heirs, in

1863, selected for them, as one of the five locations to them permitted to be made by the Act of 1860, the tract of land we call the 1863 location. His selection is in writing, and is as follows:

"Santa Fe, New Mexico, June 17, 1863.

"John A. Clark, Surveyor General, Santa Fe, New Mexico.

"I, John S. Watts, the attorney for the heirs of Don Luis Maria Cabeza de Baca, have this day selected as one of the five locations confirmed to said heirs under the 6th section of the Act of Congress approved June 21, 1860, the following tract, to-wit: Commencing at a point one mile and a half from the base of Salero mountain, in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and forty-four links, thence east twelve miles, thirty-six chains and forty-four links, thence north twelve miles, thirty-six chains and forty-four links, to the place of beginning, the same being situate in that portion of New Mexico, now included by Act of Congress approved February 24, 1863, in the Territory of Arizona, said tract of land is entirely vacant, unclaimed by anyone, and is not mineral to my knowledge."

"John S. Watts, Attorney for the heirs of Luis Maria Cabeza de Baca."

Tr. p. 174.

Thereafter, and on April 30, 1866, John S. Watts, as attorney for the heirs of Baca, made request that this

selection be amended by changing its initial point, to a point 3 miles west by south from the building known as the Hacienda de Santa Rita, and thence to run as set forth in his application. In this application, the petition in 1866, Watts says:

> "I further state that the existence of war in that part of the Territory of Arizona, and the hostility of the Indians, prevented a personal examination of the locality prior to the location, and not having a clear idea as to the direction of the different points of the compass, when the subsequent examination of the location was being made by Mr. Wrightson, in order to have the location surveyed, it was found that the mistake made would result in leaving out most of the land designed or intended to be included in said location. Mr. Wrightson was killed by the Indians and no survey has been made, because of said mistake in this initial point of location. Under these circumstances I beg leave to ask that the Surveyor General of New Mexico be authorized to change the initial point so as to commence at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence from said beginning point north 12 miles, 36 chains and 44 links, thence east 12 miles, 36 chains and 44 links, thence south 12 miles, 36 chains and 33 links, thence west 12 miles, 36 chains and 44 links, to the place of beginning. I beg leave further to state that this land which will be embraced in this change of the initial point is of the same character of unsurveyed vacant public land as that which **would have been set apart** by the location as first solicited, but is not the land intended

to have been covered by said location, but the land to be included within the boundaries above designated is the land that was intended to be located and was believed to have been located upon until preparations were made to survey said location. Under this state of the case it is hoped that directions will be given the Surveyor General to correct the mistake." Tr. p. 176.

This application of Watts for survey according to amended location, was granted by the Commissioner of the General Land Office in 1866. Watts undoubtedly considered that the lands granted to the Baca heirs under the Act of 1860, and selected for them by him as location 3, was the specific tract which was ordered to be surveyed according to the ameided description, as set forth in his application of 1866; which application had been granted by the Commissioner of the General Land Office.

The fact, as it existed at that time; or rather, what was believed to be the fact at that time; was, that the tract specifically described in Watt's application of 1866, namely, the tract of land having its beginning point 3 miles west by south from the building known as the Hacienda de Santa Rita, and running thence from said beginning point, according to the courses and distances set forth in said application, was the tract granted by Act of Congress to the heirs of Baca, as location 3.

Not only was such believed to be the fact in 1870, when Watts executed his deed to Hawley, but it continued to be considered a fact until July 25, 1899, when

the Secretary of the Interior, upon an application to survey this amended location, held that this amended location was not an amended location at all, but was the selection of a different tract of land than the one selected in 1863, and being selected after the expiration of the three years limited in the Act of 1860, was void. Decision of Secretary of the Interior, July 25, 1899, 29 L. D. pp. 44-54.

Prior to 1899, the Land Department of the United States itself considered that the tract described in the 1866 location was the land selected by the heirs of Baca. Thus on June 15, 1887, Secretary Lamar said:

> "It is conceded that a selection was made, the location designated and approved by the surveyor general June 16, 1863, agreeable to the provisions of the Act. It appears that this selection was amended upon application made therefor April 30, 1866, so as to correct what was alleged to be a mistake in defining the location, and that instruction for the survey of the location, as amended was issued by your office May 21, 1866.
> **The claimant must be held to this selection and location, and cannot be allowed to re-locate other land in lieu of it."**
>
> 5 L. D. 107.

The recital, then, in the deed from Watts to Hawley, that the tract of land therein described as situate in the Santa Rita mountains, bounded and described as commencing from the Hacienda de Santa Rita, etc., was the tract granted to the heirs of Baca, was believed to

be a fact at the time that the deed was executed.

(4) The next recital in the Watts-Hawley deed is: "and by said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D., 1864."

This is true so far as the "overlap" is concerned. It is not true so far as the other part of the tract described in the 1863 location is concerned. We will consider this recital at greater length hereafter.

(5) The next recital is "bounded and described as follows: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence etc."

This is a definite description, by metes and bounds, from a beginning point well known, which describes accurately the tract described in the 1866 selection, and also accurately and definitely describes a tract of land on the earth's surface.

As we have heretofore shown, the beginning point of this description, the Hacienda de Santa Rita, was a well-known place. During the trial the evidence was so overwhelming on this point, that the lower court, to obviate the necessity of further testimony upon the point said:

"I find that the Hacienda de Santa Rita is a well-known place." Tr. p. 385.

So correct and complete is the foregoing description,

by courses and distances, that thereafter Roskruge, the County Surveyor of Pima County, without any difficulty whatsoever, went upon the ground and made a survey of the tract, in accordance with this specific description.

(6) The next, being the last recital, is: "said tract of land being known as Location No. 3 of the Baca series."

The tract of land referred to, as being then known as "Location No. 3 of the Baca series", was the land described in the preceding sentence; namely, the land "bounded and described as follows: "Beginning at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence, etc."

Watts, in this deed, says that those lands are known as "Location No. 3 of the Baca series." As the Commissioner of the General Land Office had accepted his amended location of 1866, the foregoing statement was not only believed to be the fact by Watts, but was believed to be the fact by the Land Office itself. That tract, described in the 1866 location, was, at that time, to-wit: in 1870 and thereafter, and until 1899, generally known to be the location No. 3 which had been accepted by the Comissioner of the General Land Office.

A consideration of the history of the various selections made for "Location No. 3 of the Baca series", will shed light upon what John S. Watts meant by the words "said tract of land being known as 'Location No. 3 of the Baca series.' "

It is a fact that John S. Watts, as attorney for the Baca heirs, had made **three** different selections of land, for "Location No. 3 of the Baca series."

His first selection was made October 30, 1862, being of a tract of land at a place known as Bosque Redondo, on the Pecos River, in New Mexico. This selection was approved by the Surveyor General of New Mexico on November 8, 1862. This tract on the Pecos River was the first selection of Location No. 3 of the Baca series. Re. Baca Float No. Three, 29 L. B. 45.

Thereafter, and on January, 18, 1863, Watts, as attorney for the Baca heirs, made application to the Commisisoner of the General Land Office, to withdraw this selection with a view of making another selection in a more desirable locality. This application was allowed February 5, 1863. Id. 29 L. D. 45-46.

Watts having been allowed to withdraw his first selection, thereafter, and on June 17, 1863, as attorney for the Baca heirs, made his second selection, being the tract having its commencing point at the base of the Salero mountain, in Arizona; the tract in this brief designated as the 1863 location. This was the second "Location No. 3 of the Baca series." Id. 29 L. D., 46.

After making this second selection, being the 1863 location, certain heirs of Baca conveyed to Watts, by deed executed May 1, 1864, the tract described in this 1863 selection. The deed being Plffs. Exhibit C, Tr. p. 154.

Two years after this conveyance to him, to-wit, on April 30, 1866, Watts, still signing himself "attorney for the heirs of Baca" made application to the Commissioner of the General Land Office for leave to amend the selection so made in 1863, so that the initial point should "commence at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence from said beginning point north 12 miles," etc. This application was allowed, and the Commissioner instructed the Surveyor General to make the survey of the location in accordance with this amended description. This was the Third "Location No. 3 of the Baca Series." Id. 29 L. D. 47.

The tract first selected was permitted to be withdrawn.

Each of the three different tracts of land was "Location No. 3 of the Baca series."

The tract second selected was permitted to be amended by substitution of a different commencing point and different courses, so as to cover an almost entirely different tract of land; and this last described tract, by its amended description, became in the opinion of Watts, the Commissioner, and the Surveyor General, "Location No. 3 of the Baca Series." And, as we have heretofore shown, this tract, described in what we have been designating as the 1866 location, was by the Secretary of the Interior and the Commissioner of the General Land Office, considered as "Location No. 3 of the Baca series", until the year 1899, when

the Secretary rendered the decision in 29 L. D. 44-54, to the effect that the 1866 location was not an amendment of the description in the 1863 location, but was the selection of an entirely different tract of land, and having been made after the time limited by the Act of Congress for making a selection, was void.

But, until this decision of 1899 was rendered, the tract described in the 1866 location was considered as the particular tract of land which, under the rulings of the Land Department, had been allowed as Location No. 3 of the Baca series; and by that name the tract of land described in the amended selection was known.

Therefore, when John S Watts executed his deed to Hawley, on January 8, 1870, he had every reason to believe, and he did believe, that the tract described in his 1866 location, being the same tract he described by metes and bounds in his deed to Hawley, was "Location No. 3 of the Baca series."

And for that reason, we say, viewed in the light of the facts as they existed when that deed was made, the tract of land specifically described in the Watts-Hawley deed was "Location No. 3 of the Baca Series", as known and accepted at that time.

There remains only to be considered recital (4) in the Description in the Watts deed to Hawley, to-wit: "and by said (Baca) heirs conveyed to the party of the first part (Watts) by deed dated on the 1st day of May, 1864."

The tract of land conveyed to Watts by the deed of May 1, 1864, was only in part the same as the tract he quitclaimed to Hawley. As to the overlap, it was the same. As to the part outside of the overlap, it was not the same.

Here arises the only variance in the clauses or recitals of description in the Watts-Hawley deed.

The variance is not apparent on the face of Watts to Hawley deed. The deed from the Baca heirs to Watts of May 1, 1864, is not referred to for a more complete description of the property conveyed; no reference is made to it for any specific purpose, it is simply recited as being the source of Watt's title, and not as part of the description.

A surveyor, requested to survey the tract of land as described in the Watts-Hawley deed, would not be called upon to examine the deed from the Baca heirs to Watts, for the reason that in the Watts-Hawley deed no specific reference is made to that deed for description. With the Watts-Hawley deed in his hands, the surveyor would go to the Santa Rita mountains; he would find the place called Hacienda de Santa Rita, a well-known place, as all the evidence shows, and from that place as a point of beginning, he would and could run his lines the exact courses and distances set forth in the Watts to Hawley deed, and thus he would and could survey the specific tract of land quitclaimed by Watts to Hawley. And no one, in court or out of court, could deny that the tract he so surveyed was the specific tract

of land as bounded and described in the Watts to Hawley deed.

As was said by Mr. Justice Miller, sitting on the circuit, in a case where he was called upon to construe a deed where a question similar to the one we are now discussing, was under consideration:

> "The first descriptive clause of the deed from Armstrong to Prentice is of a tract of land a mile square, beginning at a large stone or rock, which, as a matter of fact, we find in the present case, is now identified, and was well known at the time the deed was made. The description proceeds with the points of the compass one mile east, one mile north, one mile west, one mile south, to the place of beginning. It would be difficult, the beginning point being well ascertained, to imagine that Armstrong intended to convey any other land, or any other interest in land, or interest in any other land, than that so clearly described. And, if that description is to stand as a part of the deed made by Armstrong to Prentice, it leaves no doubt where the land was; and there is no occasion to resort to any inference that he meant any other land than that."
>
> Prentice v. Northern Pac. R. Co., 43 Fed. 270-276.

The Supreme Court, in affirming the above case, said:

> "Looking into the deed, under which the plaintiffs claim title, for the purpose of ascertaining the intention of the parties, we find there a specific de-

scription by metes and bounds, of the lands conveyed, followed by a general description which must be held to be introduced for the purpose only of showing the grantor's chain of title, and not as an independent description of the lands conveyed." Prentice v. Northern Pac. R. Co., 154 U. S., 163-167, 38 L. ed. 947-953.

And the law is well settled that a general reference in a deed, to another deed, is to be considered as made for the purpose of showing chain of title, and not for the purpose of controlling a description by metes and bounds.

"It is too well settled to require the citation of authority that a particular description of premises conveyed, when such particular description is definite and certain, will control a general reference to another deed as the source of title.....The exception to this rule is where the particular description of land by metes and bounds is uncertain and impossible. Then a general description in the same conveyance will govern."

Smith vs. Sweet, 38 Atl. 554, 90 Me. 528.

"Where a grantor conveys specifically by metes and bounds so there can be no controversy about what land is included and really conveyed, a general description as of all of a certain tract conveyed to him by another person, or as in this case, all of a survey except a tract belonging to another person, cannot control, for there is a specific and particular description about which there can be no mistake and no necessity for invoking the aid of the general description."

Cullers v. Platt, 81 Tex. 858, 16 S. W. 1003.

> "We think it clear that the reference to the deed made by Snydor to Sampson Heidenheimer was given merely to point out the title and not to supplement or control the description given by the field notes."

Shaeffer vs. Heidenheimer, 96 S. W., 61.

In the case of Whiting v. Hugo Dewey, Admstr., 15 Pickering (Mass. 428) the description in the deed was as follows:

> "The following tract of land situate in Great Barrington on the pine plain not far from Jabez Turner's dwelling house, being all and the same land which the said Benedict Dewey, deceased, lately owned in a hundred acre pitch of equalizing land formerly laid out to Conrad Burghart's right, supposed and considered to be bounded" (here follows specific description) "containing in said described premises at least twenty-two acres and one-fourth of land."

In considering this description, the court said:

> "the grant is 'of the following described tract of land'; then follows the above cited words, and then follows a particular description of the land granted by metes and bounds; and this particular description is decisive as to the land intended to be granted and to which the covenants are to be referred.

Very little stress is to be placed on words of recital and general description, as to the extent of the conveyance when there is a particular description of the lands conveyed in clear and unambigious language."

15 Pick. (32 Mass.) 428-435.

"The general description 'being the same land,' given the grantor's mother to the grantee by will, will not control the specific boundaries in the deed."

Howell v. Saule, Fed. Cases No. 6782; (5 Mason 410).

"It is a well settled principle that when the land conveyed is described in the deed by clear and well defined metes and bounds so that the boundaries thereof can be thereby readily determined such description shall prevail and settle the boundaries of the land over any general words or description that may have been used in the deed, tending to enlarge or diminish the boundaries."

Speller v. Scribner, 36 Vt. 245.

Morrow v. Willard, 30 Vt. 118.

Gilman v. Smith, 12 Vt. 150.

Hibbard v. Hulburt, 10 Vt. 173.

Therefore, even if the recital in the Watts to Hawley deed, namely: "and by said heirs of Baca conveyed to the party of the first part by deed dated on the 1st

day of May, A. D., 1864" is held to be repugnant to the particular and specific description of the tract by courses and distances, then the specific description should prevail. And under this rule of construction the tract of land, situated in the Santa Rita Mountains, as bounded and described with the beginning point 3 miles west by south from the building known as the Hacienda de Santa Rita, is the tract which John S. Watts quitclaimed to Hawley by his deed of January 8, 1870, being the tract described in the 1866 location.

When the facts, as they existed in 1870 when Watts executed his deed to Hawley, are considered, it will be seen that the recital in that deed of the deed from the Baca heirs to Watts of May 1, 1864, did not create any variance or repugnance in the description; and for this reason, namely, that Watts, as the grantee under the deed from the Baca heirs referred to, thereafter himself being the owner of the tract, caused the description of the tract so conveyed to him, to be amended, so as to cover the specific tract he quitclaimed to Hawley. The facts we refer to are these:

In 1863 Watts, as attorney for the Baca heirs, made selection of the tract having its beginning point at a certain distance from the base of the Salero mountain.

On May 1, 1864, certain heirs of Baca executed their deed purporting to convey this tract to Watts, being the

deed referred to in the Watts to Hawley deed.

On April 30, 1866, Watts made application to the

Commissioner of the General Land Office, to amend the description of the tract so conveyed to him. This application was granted by the Commissioner, who ordered the Surveyor General to make the survey according to the amended description. Therefore, the tract of land, described in accordance with the amended description, was the tract which Watts believed he himself owned at the time; and the tract which would have been owned by him, had the amended selection been valid.

The recital, then, of the deed of May 1, 1864, taken in connection with the subsequent action of the Commissioner, allowing the description of the tract of land described in that deed, being the 1863 location, to be amended in accordance with Watts' application of 1866, facts which Watts knew at the time he executed his quitclaim deed to Hawley, and being matters of public record; we submit that this recital created no repugnance or variance whatsoever in the description of the tract quitclaimed by Watts to Hawley. They both knew, and well understood, that Watts, as grantee under the 1864 deed from the heirs, had become the owner of the tract according to the amended description allowed to be made in 1866. That tract Watts quitclaimed to Hawley. The subsequent decision of the Secretary, that the amended location so allowed was void, does not alter the fact that Watts did, prior to that decision, quitclaim the tract described in the amended location, to Hawley.

There is another, more simple, and perhaps more conclusive method, of determining what specific tract

of land was quitclaimed by Watts to Hawley, in the 1870 deed.

We have seen that on July 25, 1899, the Secretary of the Interior held, that this 1866 location was void, because made after the three years limited by the Act of 1860.

Now, if the Secretary of the Interior, had, at that time, decided that the 1866 location, by reason of its acceptance by the Commissioner, **was valid,** and that the heirs of Baca, and their grantees, were bound by **that** selection; what construction would this Court place upon the description of the tract of land, as set forth in the Watts to Hawley deed?

It is manifest that whatever that tract was, it passed to Hawley in 1870, and no subsequent act of the Secretary of the Interior could change the description of that tract, as set forth in the deed itself. The validity of the title might be affected by the action of the Secretary; but the words in the deed, the description of the land as described by those words, was unalterable.

If, then, the Secretary in 1899, **had** decided that the 1866 location was the tract which was selected by the Baca heirs, would this court construe the description in the deed from Watts to Hawley, to be a conveyance of the land described in the 1863 location; the tract not in the Santa Rita mountains, but in the valleys of the Santa Cruz river; the tract having its initial point at the base of the Salero mountain, and not at the Hacienda de Santa Rita.

We think not. Such a construction would do violence to every recital and every clause in the description. Indeed, it would be se clear and beyond dispute, that the deed did describe, in every particular, the tract described in the 1866 location, that there could be no argument about it.

It was 29 years after the deed **was** executed, that the Secretary **did** decide the 1866 location to be invalid. But the certain tract of land described in the Watts to Hawley deed, was still described by the same words.

If, then, the description of the tract quitclaimed by Watts to Hawley would be construed to be a quitclaim of the 1866 location, the tract in the deed specifically described, had the Secretary of the Interior in 1899 decided that the 1866 location was valid; then the same construction should be placed upon the words of description in that deed, the location having been decided to be void.

Appellees contend that under the deed from Watts to Hawley, Hawley acquired title to "Location No. 3 of the Baca series", wherever the same might be situated, irrespective of the specific description in the deed. They contend that what Watts quitclaimed to Hawley was not any specific tract of land, situated at any particular place, or bounded or described by any specific description; but that he quitclaimed to him "Location No. 3 of the Baca Series", wherever situate, or by whatever bounds described; or wherever the Secretary of the Interior might decide it to be.

A mere reading of the Watts-Hawley deed shows it will bear no such construction; for Watts quitclaimed to Hawley a certain and definite tract of land, situate in a definite place, to-wit: the Santa Rita mountains, and bounded and described by definite metes and bounds, having its initial point at the Hacienda de Santa Rita, a well known place, about which there is no question.

If it was Watts' intention to quitclaim to Hawley whatever tract of land the government might thereafter decide to be the true and valid Location No. 3 of the Baca series, he most certainly did not express any such intention in his deed. As said by Mr. Justice Miller, in the case of Prentice v. Northern Pacific R. Co., 43 Fed. 274-5, supra:

> "If such were his purpose in this conveyance, it is remarkable that he did not say so in the very few words necessary to express that idea, instead of resorting to two descriptive clauses, neither of which had that idea in it."

Or again, as said by Mr. Justice Miller in the same case:

> "Of course, any man endeavoring to ascertain what land was conveyed under that grant would suppose that, when he found the stone or rock, which we now as a matter of fact find to have an existence, and can be well identified, he had bought a mile square according to the points of the compass, the southwest corner of which commenced on that rock. He would not suppose that he had bought something that might be substituted in lieu

of that mile square by future proceedings of the government of the United States."

In the case of Prentice v. Stearns, 20 Fed. 819, also decided by Mr. Justice Miller, the description in the same deed, as the one considered in the case of Prentice v. Northern Pac. R. Co., 43 Fed. 270-276, (supra) was under consideration.

The question in that case was whether or not, under the description in the deed, a definite tract of land was conveyed, or any tract that the grantor might thereafter acquire from the government. The court held the specific description controlled.

We therefore, submit that under the Watts to Hawley deed, Watts quitclaimed to Hawley the tract of land therein specifically bounded and described, being the tract described in the 1866 location, and did not quitclaim to him any other tract of land.

It is well settled law that where the description in a deed of the land intended to be conveyed, is equivocal, ambiguous or insufficient, the subsequent acts of the parties may be proved for the purpose of ascertaining their intention.

Stone v. Clark, 1 Metcalf (Mass) 378. Authorities in note to same case in 36 Am. Dec. 373.

We do not think there is any ambiguity or uncertainty in the description of the property quitclaimed by Watts to Hawley, but as the lower court thought other-

wise, we will refer to the evidence in the case and show that Hawley himself construed this deed as quitclaiming to him the tract specifically described therein, to-wit, the tract described in the 1866 location.

Hawley resided, as recited in the deed, at Wilkesbarre, State of Pennsylvania.

The evidence discloses that he made one visit to Pima County, Arizona, being in the year 1875, Tr. p. 251.

On this visit he executed a power of attorney to John E. Magee of Tucson, Arizona, authorizing him "to abandon old mining claims and locations of mines in the Santa Rita mountains, Pima County, Arizona, and to relocate the same correctly in conformity with the mining laws of the United States, etc." Hawley acknowledged this power of attorney before a Justice of the Peace in Tucson, on May 4, 1875, and on the same day caused the same to be recorded in the office of the County Recorder. Tr. p. 254.

The date and fact of his visit to Tucson; and his business relations with John E. Magee, are matters of record.

John E. Magee was called as a witness on the trial of this case. He testified that he was 75 years of age; that he was at present Secretary of the Arizona Pioneer's Historical Society; that he came to Pima County, Arizona, in 1874, under the employ of the Sonora Mining & Exploration Company, which purported to hold the title to the amended location of Baca Float No. 3, to take charge of and look after that title and have it sur-

veyed. He had at that time in his possession a diagram showing the relative position of the amended and the original location. He went upon the ground, was shown some of the monuments; that he knew the country included in the amended location, which covered the Santa Rita mountains. He went to the Surveyor General of Arizona, asked for a survey of the amended location; the Surveyor General refused to make the survey on the ground that it was known to be mineral land for one hundred years; this was in 1874; he came here to take charge of the amended location, and had nothing to do with the other location. Tr. p. 249.

In 1875 Hawley came to Tucson. Magee further testified, we will quote from the record:

> "I was acquainted with a gentleman by the name of Christopher E. Hawley. I met him here in Tucson in March, 1875, if I am right, I think so. He did not make any statement to me in regard to the Baca Float, or at least, Baca Float No. 3, '66 location at that time. He told me that he was interested, or would be interested, in Baca Float No. 3 and would like to see the country. I showed him what I took and learned to be the amended location of Baca Float No. 3, covering the Santa Rita mountains, as described a little while ago." Tr. p. 251.

At this time the deed from Watts to Hawley had not been recorded in Pima County, or elsewhere. Indeed, Hawley never did record the deed. The first and only time it was recorded was May 9, 1885 (Tr. p. 196), a

year after Hawley had conveyed to Robinson, when it was recorded at the request of Wm. W. Belknap, (See original Plaintiffs' Exhibit N, sent up with the record);

Nor, in 1875, were any of the deeds from the heirs of Baca to Watts, recorded in Pima County. Therefore, when Hawley made his visit, the records of Pima County did not disclose who were the owners of Baca Location No . 3, and all Magee knew was that he was employed by the Sonora Mining & Exploration Company to take charge of the 1866 location and have it surveyed.

What relation, if any, Hawley bore to this mining company, the evidence does not disclose; nor is there any evidence in regard to Hawley, other than this testimony of Magee.

But it does appear, from the testimony of Magee, that Hawley went to him, the man in charge of the 1866 location. He told Magee that he was interested, or would be interested, in Baca Float No. 3, and wanted to see the country. Magee went with him to the Hacienda de Santa Rita, and showed him where Baca Float No. 3 was at that time; and what he then showed him as Baca Float No. 3 was the amended location, covering the Santa Rita mountains. Tr. p. 251.

Hawley at that time had the quitclaim deed from Watts. He came out to see the land so quitclaimed to him, without disclosing the fact that such a deed was executed to him; and he is shown the tract covering the Santa Rita mountains, the 1866 location, as being Baca

Float No. 3 at that time. He makes no demur. He makes no protest.

He sees the tract of land situate in the Santa Rita mountains; he sees the Hacienda de Santa Rita, the initial point of the 1866 location; he ascertains where the tract is that is described in Watts' deed to him; and he is content.

Never, from that day to this, has Hawley even contended, so far as the evidence in this case shows, that Watts quitclaimed to him any other or different tract of land, than the tract he visited with Magee in 1875.

On May 5, 1884, Hawley, by deed of that date, with description in the identical words of the description in the deed from Watts to himself, conveys the same tract to John C. Robinson, Tr. p. 208.

Not only did Hawley himself believe that the tract of land quitclaimed to him by Watts, was the tract in the Santa Rita mountains, having as the initial point of its description the Hacienda de Santa Rita; but John C. Robinson, to whom he conveyed this tract, positively declared that that specific tract is "Location Number 3 of the Baca Series."

This declaration is made by Robinson in the deed he executed to Powhatan W. Bouldin and James E. Bouldin of date November 19, 1892. Deft. Wise Exhibit 38, Tr. p. 400. He makes this declaration twice in the same deed, first in the recitals, and then in the description, so that there can be no question.

In this deed Robinson declares:

> "The said tract of land bounded and described in the sentence immediately foregoing this being the northern half of the tract of land known as Location No. 3 of the Baca series."

and the tract described in the sentence so referred to, is the tract described in the 1866 location; described in the deed from Hawley to him and described in the deed from Watts to Hawley.

Therefore, the interpretation placed by Hawley on the description of the tract quitclaimed by Watts to him; and by Robinson on the tract Hawley conveyed to him; makes it conclusive that the tract conveyed, and intended to be conveyed, described and intended to be described, was the tract described in the 1866 location.

Such being the fact, the lower court erred in its decree wherein it adjudged that plaintiffs, who deraign their title under Hawley, were owners of an undivided 18-19 interest in the south half of the tract of land described in the decree; being a different tract of land than the tract quitclaimed by Watts to Hawley.

The Wrightson Title Bond.

Plaintiffs introduced in evidence, upon the trial of this case, over objection, for the purpose of showing that the land quitclaimed by Watts to Hawley, was the tract described in the 1863 location, a certain instrument in writing, purporting to be signed by John S.

Watts, on March 2, 1863, and acknowledged February 8, 1864, as follows:

> "KNOW ALL MEN BY THESE PRESENTS, that I, John S. Watts, of the city of Santa Fe, Territory of New Mexico, and the owner of one of the unlocated floats, containing about 100,000 acres of land, granted to the heirs of Luis Maria Baca by Act of Congress, approved 21 June, 1860," (here follows a copy of the Act).
>
> "Be it further known that the said John S. Watts has full power and authority to make the location of said heirs, under said act, and cause to be made a title in fee for the same after such proper location and survey;
>
> Now, therefore, be it further known that I, the said John S. Watts, have this day sold to Wm. Wrightson of the city of Cincinnati, State of Ohio, the said unlocated tract, with all its privileges, for and in consideration of the sum of One Hundred and Ten Thousand Dollars, the receipt whereof is hereby acknowledged and I hereby bind myself, my heirs, executors or administrators to make a full and complete title in fee simple for said land to said William Wrightson, his assigns or legal representatives whenever thereunto required.
>
> And I, the said John S. Watts hereby authorize and empower the said W. Wrightson to make the location under the same act in as full and ample manner as the said heirs could do the same."
> Plaintiff's Exhibit L, Tr. p. 182.

This instrument has never been recorded. There is

no evidence that Wrightson assigned it to Hawley or to any one else. Nor did it appear that Hawley had any interest in it, or had ever seen or heard of it. Nor is there any evidence in any way connecting it with the the execution of the quitclaim deed from Watts to Hawley of date January 8, 1870.

Samuel A. M. Syme, a witness for plaintiffs, testified that he gave this paper to the plaintiffs; that in the fall of 1894, or the winter of 1895, thirty-one years after the paper was executed, he had himself received this paper in connection with a number of papers, which were in a satchel, from James Eldredge, to whom Hawley, in 1870, had executed a power of attorney. Testimony of Syme, Tr. p. 189.

That is all the evidence there is in his case in regard to this so-called "Wrightson Title Bond."

This instrument, executed in 1863, wherein John S. Watts sold to Wm. Wrightson, one of the unlocated Baca tracts and agreed to execute to him a fee simple title thereto whenever required, is considerd by appellees as evidence competent, relevant and material, to be considered by the court, to aid it in construing the words of description as contained in the quitclaim deed from John S. Watts to Christopher E. Hawley, executed in 1870, seven years after the title bond was signed.

They so argued before the lower court, and it is fair to presume they will so argue to this court.

If this were a suit for a specific performance of the contract set forth in the title bond, which it is not, plaintiffs would have to prove some assignment of this contract to themselves. They do not pretend to do this. At least, they would have to prove an assignment thereof to Hawley; this they utterly fail to do. But if they had done this, then they would have to prove that Watts had not made deed to Wrightson, as he agreed to do in that instrument, and even then no court of equity would decree specific performance of a contract after the lapse of fifty years.

If this were a suit for the reformation of the Hawley deed, which it is not, the court would require definite and positive proof (1) that the quitclaim deed to Hawley was executed in pursuance of the title bond to Wrightson and not as an independent transaction; (2) that Hawley was the assignee of Wrightson, by an instrument in writing valid under the statute of frauds; and (3) that a mutual mistake had been made in describing the tract of land in the Watts-Hawley deed. And even then, no court would decree reformation of a deed forty-five years after its execution.

But this is not a suit for specific performance; nor a suit to reform a deed; it is an action to quiet title, in which the deed from Watts to Hawley is offered in evidence by plaintiffs as proof of their title. The only question is "What tract of land is described therein?"

And even if the Wrightson title bond had been assigned to Hawley, which it was not; even then it would

be utterly incompetent as evidence in aid of the description in the Watts-Hawley deed, for the deed stands alone as embodying the contract between the parties, and an extraneous previously executed instrument cannot be permitted to alter or vary the terms of the deed.

As said by the Supreme Court, in Parker v. Kane, 22 How. 1-19; 16 L. ed 286-292, at the conclusion of its decision:

> "It" (the description of the land in the deed) "cannot be controlled by the declaration of the parties, or by proof of the negotiations or agreements on which the deed was executed."

In the case of Modlin v. Roanoke R. & Lumber Co., 58 S. E. 1075; 145 N. C. 218, the court held:

> "An option on property given prior to a deed of it, is inadmissible in aid of the description in the deed, where the latter stands alone as embodying the contract, and makes no reference to the option."

In that case the court said:

> "An effort is made to support the interpretation of the deed insisted on by defendant by construing the deed and option together, using the option in aid of the description contained in the deed. It is a familiar learning, however, that user of the option for such purpose is not permissible. The deed now stands alone as embodying the contract between the parties. It makes no reference to the option for description, or for any other purpose;

and while this last paper is competent evidence on the question of fraud, and to show whether or not the deed complies with the option, the authorities are clear that the paper is not relevant in aid of the description in the deed, and any attempt to use it for such purpose would therefore be improper." Modlin v. Roanoke R. & Lumber Co., 58 S. E., 1075, 145 N. C. 218.

Also McManus v. Chollar, 128 Fed. 902.

What the Supreme Court said in the case of Russel v. Trustees, 1 Wheat, 433-439, which was a suit for the reformation of a deed, is applicable to the present suit, wherein plaintiffs under the guise of a suit to quiet title, are really seeking the reformation of all the deeds under which they deraign title. The Court said:

"Where A conveys to B. by metes and bounds, the circumstances ought to be very strong to prove that he meant to convey any other lands than those specifically described, before this court would be induced to set aside one deed, and decree the execution of another. If the vendee may set up such a ground of equity, the vendor may do the same; and the intrinsic difficulties which such investigations would present, would make it generally better to leave the parties to their remedy at law. If a person, supposing himself possessed of a specific tract of land, in a certain neighborhood, should contract for the sale of that land to another, it does by no means follow that he would have sold him any other tract, in the same vicinity, to which, without his knowledge, he was then entitled, much less that he would have sold it for the

same price." . . . . . "But where an individual, supposing his warrant located on black acre, when it is, in fact, located on white acre, conveys the former by metes and bounds, it must be a strong case that will sanction a court in setting aside the conveyance of the one, and decreeing that of the other."

But the present suit, being an action to quiet title, we say, quoting the language of the Supreme Court in Prentice v. Northern Pac. R. Co., 154 U. S., 163-177, supra:

> "If this were a suit in equity to compel the reformation of the deed upon the ground that, by mistake of the parties, it did not properly describe the land intended to be conveyed, and if such a suit were not barred by time, a different question would be presented upon the merits."

Recapitulation as to Assignment 1.

The court decreed plaintiffs to be the owners in fee of an undivided 18-19 interest in the southern half of the lands in dispute, which we call Tract 1. This is assigned as error, being contrary to the evidence in the case.

The evidence shows:

1. Plaintiffs are grantees under a deed from Samuel A. M. Syme and the heirs, etc., of Alexander F. Mathews, deceased.

2. Syme had no title for three reasons: First, because the deed from Robinson to him conveyed the north half

of Tract 2; second, because Robinson had theretofore conveyed the same north half to Powhatan W. and James E. Bouldin; and third, Robinson himself did not have title to Tract 1.

3. The heirs, devisees and executors of Alexander F. Mathews deceased, had no title to Tract 1, because they only had such title as Alexander F. Mathews acquired, and he did not acquire any title to Tract 1.

4. The several grantors in the seven deeds executed to Alexander F. Mathews all deraigned whatever title they had, under deeds from John C. Robinson; and Robinson deraigned his title under two deeds, one of date November 12, 1892, from Powhatan W. Bouldin and James E. Bouldin, and the other from Christopher E. Hawley, of date May 5, 1884.

5. The property described in the deed from the Bouldins to Robinson, supra, was the tract described in the 1866 location. There was no evidence that the two Bouldins had any title whatsoever, at the time they executed this conveyance, so that, in no event, did Robinson acquire any title from them to the 1866 location.

6. The deed from Christopher E. Hawley to Robinson, supra, specifically described the tract quitclaimed to him, by the description of the 1866 location, and only conveyed that tract.

7. The deed from John S. Watts to Hawley only

quitclaimed to him the tract therein described, being the 1866 location.

8. The deed from Ireland and King also only purported to convey what interest they had in the 1866 location, and as they owned only a small interest in the 1863 location, in no event could they convey, even by proper deed, a greater interest in either tract than they had.

12. As neither Alexander F. Mathews himself, in his lifetime, nor any of his grantors, or the grantors of his grantors, owned an 18-19 interest in the south half of the tract described in the 1863 location, being the tract described in the decree, plaintiffs could not and did not acquire title thereto.

For these reasons the decree of the lower court is erroneous, so far as the undivided 18-19 interest adjudged to be in plaintiffs is concerned, and should be reversed.

ASSIGNMENT OF ERROR II.

The court erred in adjudging that the title in fee to an undivided 18-19 interest to the north half of the land in the decree described was vested in the defendants Bouldin in the proportions mentioned in the decree, or in any proportions whatsoever, and in quieting their title thereof.

The court in its decree in this case adjudged that the 18-19 interest in the north half of the tract in dispute was vested in fee in the defendants Bouldin in the following proportions: To Jennie N. Bouldin, 18-38 interest; in David W. Bouldin, 18-76 interest, and Helen Lee Bouldin, 18-76 interest, making a total of 18-19 interest. This is assigned as error, being contrary to the evidence.

The only title which the foregoing named defendants Bouldin acquired to the undivided 18-19 interest in the north one-half of the lands described in the decree, was such title, if any, as was acquired by Powhatan W. Bouldin and James E. Bouldin, under the deed executed to them by John C. Robinson of November 19, 1892, Defendants Wise Exhibit 38, Tr. p. 400.

The defendants Bouldin deraign and claim their title under said Powhatan W. and James E. Bouldin, so all we need consider in this assignment of error is, what title, if any, Powhatan W. and James E. Bouldin acquired to the north half of the tract of land in dispute, under the deed of Robinson, to them, of date November 19, 1892, Defendants Wise Exhibit 38, Tr. p. 400.

We assert that the tract of land conveyed by Robinson to Powhatan W. and James E. Bouldin in that deed, and specifically described therein, is the north half of the tract of land described in the 1866 location. The mere reading of the deed proves this to be so beyond possibility of question.

The property conveyed is thus described in said deed:

> "the said party of the first part does hereby grant .... to the said parties of the second part, their heirs and assigns forever, one-half of the above described premises, bounded and described as follows, viz: Beginning at a point six miles, eighteen chains and twenty-two links north of a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north six miles, eighteen chains and twenty-two links; running thence east twelve miles, thirty-six chains and forty-four links; thence south six miles, eighteen chains and twenty-two links; running thence west twelve miles, thirty-six chains and forty-four links, to the place of beginning. **The said tract of land bounded and described in the sentence immediately foregoing this being the northern half of the tract known as Location Number three (3) of the Baca series."** Tr. p. 400.

The reference in the description to the "above described premises," is a reference to a recital in the deed, which recital is as follows:

> "That whereas, the parties of the first and second parts, by deeds exchanged between them, the said

parties of the first and second parts, for the consideration therein specified, have granted and conveyed each to the other their heirs and assigns (the party of the first part, by deed executed at Binghamton, New York, dated twenty-eighth day of June, A. D. 1892, and the parties of the second part by deed executed at Austin, Texas, dated twenty-second day of August, A. D. 1892) an undivided half interest in all their rights, titles, property, claims and demands whatsoever, from whatever source derived, and in whatever manner acquired, in and to a certain tract of land, situate, lying and being in the Santa Rita mountains, in the Territory of Arizona, containing one hundred thousand acres, be the same more or less; bounded and described as follows, viz: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita; running thence north twelve miles, thirty-six chains and forty-four links; running thence east twelve miles, thirty-six chains and forty-four links; running thence south twelve miles, thirty-six chains and forty-four links to the place of beginning. The said tract of land being known as Location Number three (3) of the Baca Series." Tr. p. 400.

It will be observed that the tract of land is not referred to in this deed as being "the tract known and called Baca Float No. 3." It is not designated by that name. It is described as being a tract situated in the Santa Rita mountains, bounded and described in accordance with the description of the 1866 location; and then follows the statement, that **"the said tract of land bounded and described in the sentence immediately foregoing this**

being the northern half of the tract known as Location number three of the Baca series."

We submit that this deed is a conveyance simply of the tract of land so specifically and clearly described therein, to-wit, the northern half of the 1866 location; and that under no rule of construction can it be deemed a conveyance of any other or different tract of land.

As the tract of land so described therein is the northern half of the tract described in the 1866 location, Tract 2 on our diagram, it is not a conveyance of the northern half of an entirely different tract of land, to-wit, of the tract described in the 1863 location, Tract 1 on our diagram.

The lower court therefore erred in its decree, adjudging that defendants Bouldin, who claim title under this deed, have either an 18-19 interest, or any interest whatsoever, in the northern half of the lands described in the decree, being the tract described in the 1863 location, Tract 1 on our diagram.

We have heretofore shown that Robinson deraigned his title under deed from Christopher E. Hawley, and that Hawley deraigned his title under a deed from John S. Watts. We have further shown that the deed from Watts to Hawley, and the deed from Hawley to Robinson, conveyed, and only purported to convey, the tract of land described in the 1866 location.

Robinson did not himself have title to the tract described in the 1863 location, and therefore could not

convey the northern half of that tract to Powhatan W. and James E. Bouldin, and for the same reason, namely, that Christopher E. Hawley himself did not have title in the tract described in the 1863 location, he could not convey the northern half of that tract to Robinson.

Therefore, not only did the deed from Robinson to Powhatan W. and James E. Bouldin not convey, or purport to convey, the northern half of the tract described in the 1863 location; but even if it is held that he did, then that deed would not have conveyed the northern half of that tract, for the reason that the grantor, Robinson, and his grantor, Hawley, had no title thereto .

We call attention of the court to the fact that no part of the north half of the tract described in the 1863 location, Tract 1, is situate within the limits of the tract described in the 1866 location, or what we call "the overlap," as an inspection of the diagram in this brief, and of Defendants Wise Exhibit 34, clearly shows. Therefore, the defendants Bouldin have no interest whatsoever in any part of the tract described in the 1863 location, being the tract described in the decree herein, and no interest in the "overlap."

We submit that the lower court erred in its decree adjudging said defendants Bouldin to have any interest whatsoever in the tract of land described in said decree; and this part of said decree should also be reversed.

ASSIGNMENT OF ERROR III.

The court erred in decreeing plaintiffs to be the owners of an undivided 18-19 interest in the south half, and defendants Bouldin to be the owners of an undivided 18-19 interest in the north half, of the tract described in the decree, for the reason that both plaintiffs and defendants Bouldin deraign their title by mesne conveyances from Christopher E. Hawley, and the said Hawley never owned more than an undivided 13-19 interest in either the tract described in the 1863 location or in the 1866 location.

The point involved in this assignment of error is as to the **amount,** or **quantity of interest,** if any, owned by the plaintiffs and defendants Bouldin, in the tract described in the decree.

As heretofore shown, the plaintiffs and defendants Bouldin, by mesne conveyances, deraign their title from Christopher E. Hawley.

Christopher E. Hawley deraigns his title under a quitclaim deed executed to him by John S. Watts on Januar 8, 1870.

We claim that on January 8, 1870, when John S. Watts executed this quitclaim deed to Hawley, he himself did not own more than an undivded 13-19 interest in the tract of land which he so quitclaimed, whatever tract that be held to be.

The reason Watts did not own more than an undivided 13-19 interest at that date, was because, at that time, he had only acquired that amount of interest from the heirs of Luis Maria Baca.

Two deeds were executed to John S. Watts prior to his deed to Hawley, each of said two deeds being dated May 1, 1864.

One was from Quirina Baca, Guadalupe Baca and husband, Paulina Baca, Martina C. de Baca and Romalda Baca, all children of Miguel Baca, who was a son of Luis Maria Baca, Plaintiffs Exhibit D, Tr. p. 164. The same children joined in the other deed to Watts, so there is no question in this case but that the interest of the deceased son, Miguel Baca, being an undivided 1-19 interest, was conveyed to John S. Watts, and this deed need not be further considered.

The other deed, executed May 1, 1864, is the deed which plaintiffs claim conveys the interest of all the heirs of Baca to John S. Watts, Plaintiffs' Exhibit C, Tr. p. 154.

We assert that this deed does not convey the interest of the following five children of Luis Maria Baca, to-wit:

1. Domingo Baca,
2. Josefa Baca y Sanchez,
3. Felipe Baca.
4. Jesus Baca y Lucero 1st.

5. Jesus Baca y Lucero 2nd.

And as these heirs owned an undivided 1-19 interest each, 5-19 in all, Watts did not acquire their 5-19 interest by the deed executed to him on May 1, 1864.

The original Luis Maria Baca was married three times and had nineteen children, named as follows:

1. Antonio Baca, also known as Jose Antonio Baca.

2. Luis Baca.

3. Prudencio Baca.

4. Jesus Baca 1st, also known as Jesus Baca y Lucero 1st.

5. Jesus Baca 2nd, also known as Jesus Baca y Lucero 2nd.

6. Felipe Baca.

7. Domingo Baca.

8. Manuel Baca.

9. Josefa Baca, also known as Josefa Baca y Salas.

10. Josefa Baca y Sanchez.

11. Juan Antonio Baca.

12. Jose Baca.

13. Jose Miguel Baca.

14. Ramon Baca.

15. Mateo Baca.

16. Guadalupe Baca.

17. Altagracia Baca.

18. Rosa Baca.

19. Juana Paula Baca.

Of the above nineteen children, Antonio died before his father, leaving an heir, who dying left heirs. The 1-19 interest inherited by the heirs of this son Antonio was never conveyed to John S. Watts, but was conveyed by mesne conveyances, to Joseph E. Wise and Margaret W. Wise, this being the particular 1-19 interest that is not involved in the present appeal of Wise.

The grounds upon which we assert that the five children of Luis Maria Baca, just named, to-wit: Domingo Baca, Josefa Baca y Sanchez, Felipe Baca, Jesus Baca y Lucero 1st and Jesus Baca y Lucero 2nd did not convey to Watts their interest under this deed, are as follows:

1. DOMINGO BACA.

Because, though he is recited as a grantor and did sign the deed, the deed itself recites that he had theretofore conveyed his interest to Francisco Baca. The record in this case shows this to be a fact; for plaintiffs themselves introduced in evidence a deed, dated the 9th day of February, 1863, a year prior to the date of the deed of May 1, 1864, wherein Domingo Baca and wife did

convey all their interest in the lands in dispute to Francisco Baca; this deed is plaintiffs' Exhibit G, Tr. p. 173.

Francisco Baca, the grantee of Domingo Baca, **did not sign** the deed of May 1, 1864, aforesaid. Therefore, this deed, although signed by Domingo Baca, did not convey to John S. Watts the 1-19 interest inherited by the son, Domingo Baca, for the reason that Domingo Baca had prior thereto conveyed this interest to Francisco Baca; and the said Francisco Baca, his grantee, did not sign or execute said deed.

2. JOSEFA BACA Y SANCHEZ.

In the body of the deed of May 1, 1864, "Josefa Baca y Sanchez, daughter of Luis Maria Baca, and wife of Juan Luis Montoya," is recited as one of the grantors.

She did not sign or execute the deed; nor did anyone sign or execute it for her, as her attorney in fact.

The deed is signed "Tomas C. de Baca, attorney in fact **for the heirs** of Josefa Baca y Sanchez. Tr. p. 160.

As the deed recites that Josefa Baca y Sanchez herself is the grantor, it could not be her deed, unless it was signed by her, or by her attorney in fact.

Tomas C. de Baca does not purport to sign as her attorney in fact. He signs as attorney for her heirs. Therefore the deed is not the deed of Josefa Baca y Sanchez. It was not executed by her, and John S. Watts did not acquire under this deed, the 1-19 interest inherited by the daughter Josefa Baca y Sanchez.

3. FELIPE BACA.

Felipe Baca is not recited as a party grantor in the deed; nor are his heirs or children recited as grantors, nor any one claiming as a grantee under him or them. The deed recites:

> "Know all men by these presents: That we (here follow the names of each and all of the grantors), have bargained, sold and conveyed, and by these presents do bargain, sell and convey to the said John S. Watts, etc., Tr. p. 154.

Such a deed does not convey the interest of one who is not named as a grantor, for, on the face of it, it only is the deed of those who are named therein as grantors.

In the deed, amongst other grantors named ,is "Felipa Baca, wife of Jose Baca, deceased, son of Luis Ma. Baca." This Felipa Baca was a woman and a child of a deceased son of Luis Maria Baca. She was not the same person as Felipe Baca, who was the son of Luis Maria Baca. The deed contains a signature "Felipe Baca," evidently the signature of Felipa Baca, the granddaughter aforesaid.

There is no recital in the deed anywhere that the person who signed the name "Felipe Baca" was the particular Felipe Baca who was the son of Luis Maria Baca.

If the court asumes that the signature to the deed "Felipe Baca" was the signature of the Felipe Baca who was a son of Luis Maria Baca, then arises the question: Is a deed which recites the names of all of

the grantors, who purport to convey, the deed of one who in the deed is not named as a grantor, and who does not purport to convey, if his name be signed to the instrument.

A deed, like any other instrument in writing, is to be construed according to the words contained in the body of it. If the deed itself does not in any way purport to convey the interest of one who is not named therein, and who is not in any way referred to, we submit that it cannot be construed to be the deed of such person, even if the court does find that the signature "Felipe Baca" is presumed to be the signature of that particular Felipe Baca who was the son of Luis Maria Baca, and not the signature of Felipa Baca, the granddaughter.

If a deed recites "we, John Smith and Mary Smith his wife, have sold and conveyed, and by these presents do sell and convey to John S. Watts, certain described property," and one William Jones affixes his signature to the deed, does such a deed convey the interest that William Jones may have in the property described? We think not, for the reason that in the body of the deed itself, which is the contract of the parties, William Jones does not purport to convey anything. Therefore, the deed of May 1, 1864, did not convey, or purport to convey, the 1-19 interest of the son Felipe Baca.

4. JESUS BACA Y LUCERO 1ST.

The deed of May 1, 1864, also recites, amongst other grantors, the following: "I Jesus Maria Cabeza de

Baca, owner by purchase of the interest of Jesus Baca y Lucero 1st, as appears by deed of said Jesus Baca y Lucero 1st and Maria Rafael Armijo, his wife, executed the 20th day of August, 1861, and recorded in the record book Letter D, pages 12 and 13, of the Register of Deeds for Santa Ana County," etc.

The deed is signed "Tomas C. de Baca, attorney in fact for the heirs of Jesus Baca y Lucero 1st." Neither Jesus Baca y Lucero 1st, nor his heirs, are recited in the body of the deed as grantors; nor is Tomas C. de Baca recited as the attorney in fact either for Jesus Baca y Lucero 1st, or for his heirs. Therefore, this deed cannot be construed as being the deed of Jesus Baca y Lucero 1st or his heirs.

The deed is also signed "Jesus Maria Baca, purchaser of the interest of Jesus Baca y Lucero 2nd." The ancestor, Luis Maria Baca, had two sons, each named Jesus Baca y Lucero; one was called Jesus Baca y Lucero 1st, and the other Jesus Baca y Lucero 2nd, being the children (4) and (5) in the list of the above nineteen children of Baca, heretofore set forth.

If the court construes this Jesus Maria Baca, who is the purchaser of the interest of Jesus Baca y Lucero, to be the same person who in the deed is recited by the name of Jesus Maria Cabeza de Baca, owner by purchase of the interest of Jesus Baca y Lucero 1st; or if the court disregards as surplusage the statement affixed to the signature of Jesus Maria Baca, to-wit, "the purchaser of the interest of Jesus Baca y Lucero 2nd," then

the deed would be good as a conveyance of the interest which Jesus Maria Cabeza de Baca had purchased from Jesus Baca y Lucero 1st.

It is a fact, in evidence in the case, that Jesus Baca y Lucero and Maria Rafael Armijo, by deed dater August 20, 1861, did convey to Jesus Maria C. de Baca, all their interest in the lands of Luis Maria Cabeza de Baca, deceased. Plaintiffs' Exhibit H, Tr. p. 174.

As this deed of date August 20, 1861, is recited in the deed of May 1, 1864, as the deed under which Jesus Baca y Lucero 1st and wife had conveyed their interest to Jesus Maria Cabeza de Baca, it would seem that Jesus Baca y Lucero 1st had conveyed his interest to Jesus Maria Cabeza de Baca, and that said Jesus Maria Cabeza de Baca, in signing his name as "Jesus Maria Baca," to the deed of May 1, 1864, did convey the interest, he so acquired, to John S. Watts.

We have deemed it necessary, however, to call attention to this by assigning it as an error, for the reason that a consideration of the foregoing facts must be made in order to understand the objection that we made to the deed as a conveyance of the interest of the other son, Jesus Baca y Lucero 2nd.

If the court does find from the foregoing consideration, that the deed of May 1, 1864, was good as a conveyance of the 1-19 interest inherited by Jesus Baca y Lucero 1st, and by him conveyed to Jesus Maria Cabeza de Baca, then the court would further find that the deed of May 1, 1864, conveyed to John S. Watts a total of

14-19 interest, instead of a total of 13-19 interest, as heretofore claimed by us.

5. JESUS BACA Y LUCERO 2ND.

We have just called attention to the fact that the original Luis Maria Baca had, amongst his nineteen children, two sons, one named Jesus Baca y Lucero 1st, and the other named Jesus Baca y Lucero 2nd.

Jesus Baca y Lucero 2nd is not named as a grantor in the deed of May 1, 1864; his heirs are not named as grantors, nor is anyone named as his or their grantee. The deed itself is not signed by Jesus Baca y Lucero 2nd; or by his heirs; or anyone who purports to be either his attorney in fact, or the attorney in fact of his heirs.

As we have just shown, the deed is signed "Jesus Maria Baca, purchaser of the interest of Jesus Baca y Lucero 2nd; but we have further shown that the most that can be considered in regard to this signature is, that the signer, Jesus Maria Baca, signed it as the purchaser of the interest of Jesus Baca y Lucero 1st, which would make the deed good as a conveyance of the interest inherited by Jesus Baca y Lucero 1st.

But we submit, that under no process of construction or reasoning can this deed of May 1, 1864, be construed to convey the interest of Jesus Baca y Lucero 2nd, who was in no way a party to it, and who did not sign it.

If this court holds the deed of May 1, 1864, is good as a conveyance of the interest inherited by Jesus Baca

y Lucero 1st, and by him conveyed to Jesus Maria Baca, although signed "Jesus Maria Baca, purchaser of the interest of Jesus Maria Baca **2nd,"** it cannot hold the deed also to be good as a conveyance of the interest of Jesus Baca y Lucero 2nd; for Jesus Maria Baca is recited as being the grantee of only one of these two Jesus Baca y Luceros.

Therefore, we submut, that the deed of May 1, 1864, did not convey the interest inherited by the following four children of Luis Maria Baca, to-wit: Domingo Baca, Josefa Baca y Sanchez, Felipe Baca and Jesus Baca y Lucero, making a total of 4-19 interest. And that the total quantity of interest acquired by John S. Watts, under the deed of May 1, 1864, was 14-19 interest, and no more. We waive the assignment of error as to one of the Jesus Baca y Luceros, because we think the deed good as to one of them.

The laws in force in the Territory of Arizona on May 1, 1864, when the above mentioned deed to Watts was executed, are contained in the Statutes of the Territory of New Mexico in force at that time, which laws, by Act of Congress of February 24, 1863, creating the Territory of Arizona, provides that the laws of New Mexico shall be extended over the Territory of Arizona until changed by its own legislative enactment. And the legislature of Arizona did not enact a new code of laws until November 19, 1864, when it adopted what was known as the "Howell Code." The Statute of the Territory of New Mexico in regard to conveyances, was as follows:

"Sec. 1. Any person or persons or body politic holding, or who may hold, any right or title to real estate in this Territory, be it absolute or limited, by possession, in part payment, or transfer, may convey the same in the manner and subject to the restriction prescribed in this Act.

"Sec. 4. All conveyances of real property shall be subscribed by the person transferring his title or interest in said real property, or by his legal agent or attorney.

"Sec. 5. Every instrument in writing by which real estate is transferred or affected, in law or in equity, shall be acknowledged and certified to in the manner hereinafter prescribed."

Act of January 12, 1852. Set forth in Compiled Laws of New Mexico of 1865.

The foregoing provisions, requiring a conveyance of real estate to be in writing, signed by the party, has ever since been the laws of Arizona, made so by subsequent legislative enactment.

The deed of May 1, 1864, which we have been considering, is an ancient deed, being more than 30 years old. 2 Corpus Juris, p. 1136. Dodge vs. Briggs, 27 Fed., pp. 160-170.

And being an ancient instrument, is admissible in evidence without direct proof of its execution. 17 Cyc. 433.

Upon the trial of this case defendants Wise objected to the introduction in evidence of this deed of 1864, as the deed or conveyance of each of the five children above named. The objection was overruled and exception taken. Assignment of Error IV.

The purpose of the objection, at the time, was to direct the attention of the court and counsel to the fact that this deed was not good as a conveyance of the interest of any of said five named children of Luis Maria Baca, except, perhaps, the interest of Jesus Baca y Lucero 1st. But that it was absolutely incompetent as evidence of a conveyance of the interest of the other four children, to-wit: Domino Baca, Josefa Baca y Sanchez, Felipe Baca and Jesus Baca y Lucero 2nd.

Now, John S. Watts, on January 8, 1870, executed his quit claim deed to Christopher E. Hawley, heretofore considered. Tr. p. 193.

Thereafter and on May 30, 1871, the interest inherited by the five children of Luis Maria Baca, above named, to-wit: Domingo Baca, Josefa Baca y Sanchez, Felipe Baca, Jesus Baca y Lucero 1st and Jesus Baca y Lucero 2nd, was duly conveyed to John S. Watts. The deed is plaintiff's Exhibit O, Tr. p. 197.

Here then arises the question, whether or not the title to the 4-19 interest acquired by John S. Watts under this deed to him of date May 30, 1871, inured to the benefit of Christopher E. Hawley, his grantee in the prior quitclaim deed of January 8, 1870.

And being an ancient document, the recital of facts therein are presumed to be true without proof, not only as against parties to the deed, but also as against strangers. Deery's Lesse vs. Cray, 5 Wall., 795-808, 17 Cyc. 444.

> "The fact that an instrument is an ancient docudoes not, however, affect its admissibility in evidence, further than to dispense with proof of its genuineness, where it is otherwise admissible."
> 17 Cyc. 444.

> "The doctrine of admitting ancient documents in evidence without proof of their genuineness is based on the ground that they prove themselves, the witness being presumed to be dead. The doctrine goes no further than this. The questions of its relevancy and admissibility as evidence cannot be affected by the fact that it is an ancient document. It is no more inadmissible on that ground than if it were a newly executed instrument."

> Greenleaf Ev., Secs. 21, 142, 155, 576.

> King vs. Watkins, 98 Fed., 913-925 (Above quotation from p. 917.

Therefore, although the deed of 1864 is an ancient document, nevertheless, the question as to whether or not by its terms the interest of the five heirs mentioned was conveyed therein or thereby to John S. Watts, is to be determined by the same rules of construction which apply to a deed executed yesterday.

The lower court held that it did; and this we claim is error.

A consideration of this question is necessary, for the reason that whatever interest the plaintiffs and defendants Bouldin acquired, was acquired under mesne conveyances from Christopher E. Hawley; and if Hawley only acquired a 13-19 interest, or, (since we concede the 1864 deed to be a good conveyance of the 1-19 interest inherited by Jesus Baca y Lucero 1st), a 14-19 interest of whatever lands were quitclaimed to him by John S. Watts, then that is all the interest that has been acquired by plaintiffs and defendants Bouldin, his mesne grantees, to either the 1863 or 1866 location.

If this court holds that the property quitclaimed by Watts to Hawley was the 1863 location, then all that Hawley acquired in that tract, under his deed from Watts, was an undivided 14-19 interest to the tract described in the 1863 location.

On the other hand, if this court holds that the property quitclaimed by Watts to Hawley is the tract described in the 1866 location, then all that Hawley acquired under the deed from Watts was an undivided 14-19 interest in and to the overlap, being that part of the 1863 location which is included within the limits as bounded and described in the deed, and plaintiffs, as mesne grantees under Hawley, are the owners of no more than this undivided 14-19 interest in said overlap.

The question, then, as to whether or not the 4-19 interest, acquired by Watts in 1871, inured to the benefit

of Hawley, is necessary to be decided, no matter how this Honorable Court may decide the question of description.

The deed from Watts to Hawley was a quitclaim deed.

The operative words in the deed from Watts to Hawley of January 8, 1870, are: "remise, release and quitclaim" with no other words of grant or conveyance whatsover, and no covenant of title. Tr. p. 193-194.

> "Quitclaim deeds contain usually, as their operative words, 'remise, release and forever quitclaim.' "
> Tiedeman on Real Property, Sec. 781, p. 732-3.
> 9 Am. and Eng. Ency. of Law, p. 137.
>
> Wholey v. Cavanaugh, 88 Cal. 134-135.
>
> "A quitclaim deed only passes that interest which the grantor had at the time of the conveyance,.... and should the grantor subsequently acquire the title, no estoppel arises against him in favor of the grantee to prevent his enforcement of the title."
>
> Tiedeman on Real Property, Sec. 781, p. 732-3.
>
> "A quitclaim deed does not pass any more title than the grantor has."
>
> May v. LeClair, 11 Wall, 232; 20 L. ed. 50.

In that case the court said, in speaking of a quitclaim deed:

> "In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the

grantor could lawfully convey."

May v. LeClair, supra.

"Accordingly a quitclaim deed will not estop the grantor from setting up a title subsequently acquired by him."

16 Cyc. 693, and authorities there cited.

Without citing further authority we feel justified in saying that it is established law, that after-acquired title does not inure to the benefit of the grantee in a quitclaim deed, unless some positive statutory provision so prescribes.

The statute of Arizona, on the subject of after-acquired title, in force in 1870, when the deed from Watts to Hawley was executed, is found in the Howell Code, which went into effect the 20th day of April, 1865. The statute is as follows:

"Sec. 33. If any person shall convey any real estate, by conveyance, purporting to convey the fee simple absolute and shall not, at the time of such conveyance, have the legal estate in such conveyance, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance."

Howell Code, Chap. XLII, Sec. 23, p. 279.

The same Section is also contained in Compiled Laws of Arizona of 1877, Section 2277, p. 384.

The foregoing statute, so in force in Arizona in 1865, and thereafter and in 1870, is the same, word for word, as the California statute on the same subject, being Sec. 33 of the California Acts of 1850, p. 252.

Before Arizona adopted this statute from California, the Supreme Court of California, in a number of cases, decided that a quitclaim deed was not a conveyance purporting to convey "a fee simple absolute," and after-acquired title did not inure to the beneft of a grantee in a quitclaim deed.

In the case of Morrison v. Wilson, 30 Cal. 344, decided October, 1866, the California statute is quoted in full.

In that case the question was, whether or not, under the foregoing statute, a deed was a quitclaim deed or was a conveyance purporting to convey the property in fee simple absolute.

The deed in question recited that the grantor "has granted, bargained, sold and hereby conveys to the said Minor, his heirs and assigns, a fifty vara lot in the City of San Francisco, known" (here comes description) "with all its appurtenances, thereto belonging..... to have and to hold to the said Minor, his heirs and assigns free from claims of said Perkins or his heirs; and the said Perkins covenants he has done no act to encumber or injure the title thereof. **It is fully understood as to title this is only a quitclaim deed."**

The court said: "The first question is whether the

deed by Perkins to Minor 'purports' to convey the lot in controversy 'in fee simple absolute.' "

> "The first clause in the deed bearing upon the question shows a bargain and sale of the lot and, taken by itself, would establish beyond dispute that the intention was to convey in full property. But in view of the clause with which the deed concludes, it is manifest to our judgment that the parties intended a quitclaim only."

And the court held, that being a quitclaim deed, it did not convey the subsequently acquired title of the vendor.

In the case of Quivey v. Baker, 37 Cal. 465-472, decided in 1869, the court held:

> "The principal that a title acquired by the vendor after a conveyance by him in fee inures to the benefit of his vendee, does not apply when the vendor's deed was a quitclaim, even if it contains a qualified warranty against a specified adverse claim set up by a third party."

In the case of McDonald v. Edmunds, 44 Cal. 328, the court said:

> "The conveyance by the defendant to the plaintiff of the 400 acres, including the premises in controversy, was by a quitclaim deed. . . . . It has been repeatedly decided by this court that a conveyance of a quitclaim deed does not preclude the grantor from afterwards acquiring and holding for his own use the true title to the land.
>
> McDonald v. Edmunds, 44 Cal. 328.

Also Anderson v. Yoakum, 94 Cal. 227.

Cadiz v. Majors, 33 Cal. 288.

Sullivan v. Davis, 4 Cal. 291-293.

The most conclusive case on this point is the case of Field v. Columbet, 4th Sawy. 523, Fed. Cases, 4764, decided by Mr. Justice Field sitting on the Circuit, in July, 1864.

In that case Mr. Justice Field said:

> "The only practical difference in deeds in use in this state," (California) "arises from their operation under the statute upon subsequently acquired interest, or from the covenants implied by the particular terms.
>
> "The quitclaim deed only passes such interest as the grantor possesses at the time, and has no operation whatever upon subsequently acquired interest. By its execution, the grantor does not affirm the possession of any title, nor is he precluded from subsequently acquiring a valid title and holding it for his own benefit. Subsequently acquired title does not inure in any respect to the benefit of the grantee in the quitclaim; and herein lies its distinction from the deed in fee simple absolute under the statute or the deed with covenants."

Field v. Columbet, 4 Sawyer, quoting from p. 528.

As the statute of Arizona in force in 1870, when the quitclaim deed from Watts to Hawley was executed, was

adopted from the statute of the State of California, Arizona adopted at the same time the construction placed upon that statute by the Supreme Court of California. Such is the well-established rule of construction, announced by the Supreme Court of the State of Arizona, in repeated decisions:

> "Where the territory has adopted a statute of another state, which has been construed by decisions of that state promulgated before it was enacted by this territory, such construction is also adopted." Territory v. Delinquent Tax List, 3 Ariz. 117; 21 Pac. 768.
>
> Cheda v. Skinner, 6 Ariz. 196; 57 Pac. 64.
>
> Goldman v. Sotelo, 8 Ariz. 85; 68 Pac. 558.
>
> Elias v. Territory, 9 Ariz. 1; 76 Pac. 605.
>
> "The adoption of a statute from another state adopts with it the construction placed upon it by the Supreme Court of that State at the time of such adoption."
>
> County of Santa Cruz v. Barnes, 9 Ariz. 42.
>
> Costello v. Muheim, 9 Ariz. 422; 84 Pac. 906.
>
> Murphy v. Brown, 12 Ariz. 268; 100 Pac. 901.

It therefore is clear, under the laws of the Territory of Arizona in 1870, when the Watts to Hawley quitclaim deed was executed, that the deed, being a deed of quitclaim, did not purport to convey a fee simple absolute,

and therefore the title after acquired by Watts did not inure to Hawley under his quitclaim deed.

This after-acquired title, being the undivided 4-19 interest of those heirs of Baca who had not conveyed to Watts in the deed of 1864, descended to the heirs of John S. Watts, upon his death, he never having executed any deed, prior to his death, other than the quitclaim deed to Hawley.

In order to escape this inevitable conclusion, appellees contend that the deed from the heirs of Baca to Watts, of date 1871, was a ratification and confirmation of the title conveyed to Watts by the deed of May 1, 1864, and for that reason, under the doctrine of relation, it made valid whatever defect there was in the deed of May 1, 1864; on the theory that a principal can ratify the act of his agent, which ratification makes valid the act at the date of its commission.

We will consider this contention of appellees.

The deed of 1871 from the heirs of Baca to Watts first purports to be a grant, bargain and sale deed, with covenants of warranty of a tract of land situate in northern Arizona, known as Location No. 5 of the Baca series, and has nothing whatsoever to do with the lands in dispute in this action. After the habendum and covenants of this deed, the heirs who execute the same, by Tomas C. de Baca, their attorney in fact, have inserted the following provision: "And the said heirs of Luis Maria Baca, above mentioned, now ratify and confirm the title

made by us, and by our attorney, Tomas Cabeza de Baca to John S. Watts, his heirs and assigns, on the first day of May, 1864, for the lands described in..... Location No. 3, situate in Arizona Territory, containing each 99,289 and 39-100 acres, the boundaries of which are set forth and described in the deed; and the said heirs of said Luis Maria Baca deceased, executing this deed as herein set forth, relinquish and quitclaim to said John S. Watts, his heirs and assigns, all their right, title and interest in all the lands in said deed of May 1, 1864, mentioned and described."

Witness our hands and seals, etc.

Plaintiffs' Exhibit O, Tr. p. 197—quoting on p. 202.

The first sentence above is a ratification and confirmation of the title made by those of the signers, or their attorney in fact, **who executed the deed of May 1, 1864.**

As to any of them who did not execute that deed, it was not his deed, and could not be ratified or confirmed.

As said by the Supreme Court of California on this subject:

> "A confirmation is a contract by which an act that was voidable is made firm and unavoidable. It necessarily implies a prior voidable act. A deed is an instrument in writing, sealed and delivered; without a delivery the writing is not voidable but is void—a mere nullity.....

> It was a misapplication of terms to say that the parties desired to confirm the grant, for one of the parties to the second deed was not a party to the first; the first deed was not a grant; .....
> If the second deed was of any force it derived its value from its own execution and delivery."

Barr v. Schoeder, 32 Cal. quoting on p. 616-617;

also Branham v. Mayor, 24 Cal. 585.

Duvlin on Deeds, Vol 1. 2nd. Ed. Sec. 17.

If then, the deed of May 1, 1864, was void as to Francisco Baca, the grantee of Domingo Baca, because he did not execute it; his subsequent execution of the deed of 1871 could not possibly ratify or confirm what he did not do at all in 1864; namely: execute the deed of that date.

Also as to Josefa Baca y Sanchez. She never signed the deed of 1864. It was not her deed at all. She conveyed no title by that deed, and therefore, neither she, nor her heirs could ratify or confirm a title which they never had made. Their deed could only have effect from the date it was executed, and that was in 1871.

This also applies to Felipe and to Jesus Baca y Lucero the 2nd, neither of whom conveyed, or purported to convey, any title whatsoever, in the 1864 deed.

To quote again from the case of Barr v. Schoeder, supra:

"The first deed having omitted the name of the intended grantee, the transmission of the title to the plaintiff must of necessity depend upon the second deed in which he is described."

"An attempt to confirm a void deed, so as to make it operative, may fail to effect that purpose, but may still operate as a new grant."

Chester v. Breitting, 32 S. W. 527, 88 Tex. 586.

Due v. Howland, 6 Cow. 277.

Jackson v. Stevens, 16 Johns 110.

Barr v. Schweder, 32 Cal. 609.

In so far as the deed from the Baca heirs to Watts of 1864 was void as to certain of the heirs, by reason of the fact that those heirs, or their grantees, did not sign it, it could not be ratified or confirmed by the subsequent deed of 1871. That subsequent deed was a new conveyance, and whatever interest or title was conveyed thereby could only date from the date of the deed itself, it could not date back by relation to the deed of 1864 which was void as to those who did not execute it.

Therefore, the words of ratification and confirmation contained in the deed of 1871, did not vest in John S. Watts anything more than a new title to said 4-19 interest, having its origin at the date of the signing of this deed.

Again the following clause in the deed of 1871, to-wit:

> "and the said heirs of the said Luis Ma. Baca, deceased, executing this deed as herein set forth, relinquish and quitclaim to said John S. Watts, his heirs and assigns, all their right, title and interest in all the lands in said deed of May 1, 1864, mentioned and described."

shows conclusively that this deed was a new conveyance from Baca heirs to Watts, quitclaiming to him, on the date of the execution of that deed, all their right in the property described in the deed of 1864, and nothing more.

We think it clear that the title which John Watts acquired by the deed of May 30, 1871, was an entirely new title, so far as the undivided 4-19 interest is concerned, which was not theretofore conveyed to him by the deeds of May 1, 1864.

And if the title of John S. Watts to this 4-19 interest was only vested in him by the deed of May 30, 1871, then that interest did not inure to the benefits of Hawley, as grantee under the quitclaim deed of 1870.

Therefore, the only title that Hawley acquired under the quitclaim deed executed to him by John S. Watts on January 8, 1870, was the title which John S. Watts himself then had, namely, an undivided 14-19 interest in the tract of land described in that deed. The other 4-19 interest, thereafter acquired by John S. Watts, did not inure to the benefit of Hawley, but upon the death of Watts, passed to his heirs.

If the tract of land described in the deed to Hawley is by this Court held to be the tract described in the 1866 location, then Hawley acquired by that deed an undivided 14-19 interest in the overlap. And that is what plaintiffs acquired under the various mesne conveyances from him.

On the other hand, if this court holds the tract described in the deed to Hawley to be the tract described in the 1863 location, being the tract described in the decree herein, then Hawley acquired by that deed an undivided 14-19 interest in said lands, and no more. And that is all the interest that plaintiffs and defendants Bouldin could possibly acquire, by mesne conveyance from Hawley.

In either event, the decree of the lower court, adjudging plaintiffs and defendants Bouldin to have acquired, as such mesne grantees, an undivided 18-19 interest in any part of the lands described in the decree, is erroneous, and should be reversed.

ASSIGNMENT OF ERROR IV.

The court erred in overruling the objection of defendant Wise to the introduction in evidence by plaintiffs of the deed of May 1, 1864, from certain heirs of Baca to John S. Watts, insofar as said deed pretended to be executed by, or to be the deed of, the following heirs of Baca, to-wit: Domingo Baca, Josefa Baca y Sanchez, Felipe Baca, Jesus Baca y Lucero 1st, and Jesus Baca y Lucero 2nd

The deed above referred to is the deed which we have considered in the foregoing assignment of error III; and what was there said is also applicable to this assignment of error IV.

This deed, Plaintiffs Exhibit C, being competent evidence as to those heirs of Baca who did execute it, was properly received in evidence to show the deraignment of plaintiffs' title from them. But at the time the deed was offered, and in order to direct the attention of the court and counsel to the fact that it was not the deed of the five, or at least four, of the heirs above mentioned, we objected to its admission in evidence as a deed or conveyance of the title of those specified heirs. Our objection was overruled and exception taken.

For the reasons heretofore stated, in consideration of Assignment of Error III, the court may well hold that this deed is good as the deed of Jesus Baca y Lucero 1st; but we urge that it is not the deed or valid conveyance of the interest of the other four named heirs, and there-

fore John S. Watts did not acquire their interest, being an undivided 4-19 interest, under the deed of May 1, 1864.

RESUME OF ASSIGNMENTS OF ERROR, I, II, III AND IV.

We have now considered the first four assignments of error, which directly raise the question as to what title plaintiffs and defendants Bouldin have in the property in dispute.

We have shown that defendants Bouldin have no title whatsoever to any part of the tract of land described in the decree; and we have further shown that plaintiffs, Cornelius C. Watts and Dabney C. T. Davis, have no interest in the tract of land described in the decree, except an undivided interest, less than 18-19 interest, in what we call the overlap, being a tract containing about 6,000 acres. We will hereafter show that under the evidence in this case the 18-19 interest in the tract of land described in the decree, exclusive of the overlap, and the 4-19 interest in the overlap, is owned by Joseph E. Wise, Santa Cruz Development Company and the Intervenors, in the proportions hereinafter set forth; and that the lower court should have so decreed.

ASSIGNMENTS OF ERROR V, VI AND VII.

The Court erred, after admitting in evidence deed from the heirs of John S. Watts to David W. Bouldin, dated September 30, 1884, conveying to Bouldin an undivided 2-3 interest in the lands described in the decree, subject to the following objection of plaintiffs, to-wit: That the deed from said John S. Watts to Christopher E. Hawley, of date January 8, 1870, conveyed full title to Hawley, said heirs had no title and nothing to convey; in thereafter sustaining said objection.

As heretofore stated, the heirs of John S. Watts inherited all the interest in said lands which had not been by John S. Wise quitclaimed to Hawley, in the deed of January 8, 1870.

Appellant, Joseph E. Wise, offered in evidence the deed from said heirs to David W. Bouldin, of date September 30, 1884, conveying to him an undivided 2-3 interest of all their interest in the lands described therein, including the tract of land described in the 1863 location. Defendants Wise Exhibit 16, Tr. p. 272. Plaintiffs and defendant Santa Cruz Development Co., objected thereto. The court overruled the objection and objectors excepted.

Defendants Wise then offered in evidence a certified copy of the first record of said deed, said record having been made prior to the deed being acknowledged. Plaintiffs and Santa Cruz Dev. Co. objected thereto on the grounds heretofore set forth, to the introduction of De-

fendants Wise Exhibit 16, and made further objection that the paper was not entitled to record, the same being acknowledged, and that there is no proof of its execu- an exemplified copy of an unacknowledged paper. This paper was received in evidence subject to said objection, and marked Defendants Wise Exhibit 17, Tr. p. 282.

It therefore appears in the record that Wise offered in evidence the deed of September 30, 1884, after it was acknowledged and recorded, being Defendants Wise Exhibit 16. Tr. p. 272. and that he also offered in evidence a certified copy of the first record of the deed, it having been recorded before it was acknowledged, said certified copy being Defendants Wise Exhibit 17, Tr. p. 282.

Now, after plaintiffs and defendants Wise had rested, the court heard argument upon the construction of the deed from John S. Watts to Hawley, of 1870, and after that argument ruled, that this deed conveyed to Hawley full title to the tract described in the 1863 location, and that the title thereafter acquired by Watts in 1871, inured to the benefit of Hawley, his grantee under that deed. Tr. pp. 417-419.

The court having announced this ruling, as set forth on pp. 417-419 of the transcript, the following occured, as set forth in the transcript, to-wit:

> "The attention of the court was then called to the instrument of September 30, 1884 (Defendants Wise exhibit 17), received subject to the objections of the plaintiffs and the Santa Cruz Development

> Company. The court now sustains the objections of the plaintiffs. Exceptions were duly taken by all the Wise defendants, the Ireland heirs (Intervenors) and Santa Cruz Development Company." Tr. p. 419.

As the objections made by the plaintiffs to the introduction of Defendant Wise Exhibit 17, which was merely a certified copy of the record of the deed from Watts' heirs to Bouldin, aforesaid, were different from the objections made to the deed itself after it had been acknowleged (Defendants Wise Exhibit 16), the foregoing ruling of the court, sustaining the objections of plaintiffs to Defendants Wise Exhibit 17, do not apply to Defendants Wise Exhibit 16; and said Defendants Wise Exhibit 16 is in evidence in this case, with the objection by plaintiffs overruled, and exception by plaintiffs taken to the ruling.

The defendant Santa Cruz Development Company also objected to the introduction in evidence of Defendants Wise Exhibit 16; but their objections were overruled, and they took exception at the time. Tr. pp. 281-282. And the court never did sustain their objections to either Exhibit 16 or Exhibit 17.

In view of the record in the matter, Defendants Wise Exhibit 16 is in evidence in this case.

Should this court not agree with us as to our views of the record, and hold that the subsequent ruling of the lower court did, in effect, sustain the objection of plaintiffs to Defendants Wise Exhibit 16, the objection

being on the ground that at the time the heirs executed it they had no title to convey; then we submit that this ruling is erroneous, and our exception thereto well taken, for the reason, as we have shown, that John S. Watts, at the time of his death, **did** have an interest in the lands described in the 1863 location, and his heirs inherited that interest, as we have heretofore shown; and the court erred in sustaining said objection.

As the Santa Cruz Development Company has taken a separate appeal in this case, and as it will urge the consideration of the objections made by it to the introduction in evidence of said deed from the Watts heirs to Bouldin; and as it will attack the validity of that deed upon the grounds set forth in its objections, we will consider each of the objections so made by the Santa Cruz Development Company, and will show each to be without merit. And we will further show that said deed was a good and valid conveyance, under which David W. Bouldin became vested with an undivided 2-3 of all the interest in Baca Float No. 3, according to the description of the 1863 location, which the heirs of Watts inherited from their ancestor, John S. Watts.

Argument upon the Deed from Heirs of John S. Watts to David W. Bouldin, of September 30, 1884, Defendants Wise Exhibit 16, Tr. pp. 272-281.

This deed was executed by the son, John Watts, for himself, and as attorney in fact for his mother and the other heirs.

The defendant Santa Cruz Development Company asserts that this deed is no deed, or void, for each of the following reasons:

1. That there is no proof of the authority of John Watts to execute the deed as attorney in fact for the other heirs.

2. That the deed does not recite the authority of John Watts to execute the same as attorney in fact for the other heirs.

3. That the law of Arizona in force when the deed was made required the power of attorney to be acknowledged.

4. That the deed was not properly acknowledged or proved.

5. That there was no consideration for the deed.

6. That the instrument is not a deed, but an executory contract to convey.

We will consider each of these objections, and show there is no merit in them whatsoever.

First point raised by Santa Cruz Development Company, to-wit:

That there is no proof of the authority of John Watts to execute the deed as attorney in fact for the other heirs.

The deed was executed in September, 1884. This

case was tried in March, 1915. The deed was then over 30 years old. It was an ancient document.

1 Ency. of Evidence, p. 860.

The deed does not, in the body of it, recite that Elizabeth A. Watts, by John Watts, her attorney in fact, executes the same, nor does it recite, in the body of it, that any of the other heirs, by John Watts, their attorney in fact, executed the same.

But, the deed is signed, "Elizabeth A. Watts, by attorney in fact, John Watts;" "J. Howe Watts, by attorney in fact, John Watts," and so on for each of the heirs.

Being an ancient deed, the power to execute it by the attorney in fact will be presumed.

> "If an ancient paper shown to be otherwise competent recites an authority under which it purports to be executed, or recites facts equivalent to a power, the recital is **prima facie** evidence of the authority, provided the recital shows the principal's names, and provided also acts of ownership have been done under the instrument."
>
> 1 Ency. of Ev., 878, and authorities there cited.
> "If there is no such recital and the paper appears to have been signed by one person on behalf of another, some evidence of authority must be produced."
>
> 1 Ency. of Ev., 879.
>
> "But the contrary has been held as to deeds executed by attorneys in fact, deeds of community

property, of partnership property, and deeds executed by persons unable to write."

1 Ency. of Ev., 879-880.

"The conveyance appeared to be more than 30 years old, and no objection was taken to its admissibility as an ancient instrument, except that the instrument in such cases is required to recite or purport, in the body of it, that it is made for and by authority of the owner. We think this is not indispensable, and that it is sufficient if such expression appear in the signature of the instrument, which is an essential part of a deed, and indispensable to give it any effect. That a deed signed 'R. W. B. Martin, by his attorney John S. Martin,' is sufficient to convey R. W. B. Martin's title, if John S. Martin in fact held a power of attorney, although there be nothing in the body of the deed on the subject, is practically held in Hill v. Conrad, 91 Tex., 341; 43 S. W., 789. This being so, it must be held that an ancient instrument thus executed will authorize the authority to be presumed."

Ferguson v. Ricketts (Tex. Civ. App.), 55 S. W., 975.

Note to Vol. 1, Ency. of Ev., p. 880.

"And where" (proof is) "required at all, slight evidence of authority will suffice."

1 Ency. of Ev., p. 880.

Not only is the power of John Watts to execute the deed, it being an ancient instrument, presumed; but

John Watts himself, whose deposition was taken in the case, and is part of the evidence in the record, testified that he had written powers of attorney from all the heirs, authorizing him to execute the deed. (Testimony of Watts, Tr. pp. 283-312.)

John Watts, son of John S. Watts, residence Newton, Kansas, where his deposition was taken on behalf of appellant Wise, testified that he was 74 years old; that for 20 years he was a banker, and for 24 years in government service as a National Bank Examiner, National Bank Special and National Bank Receiver. Tr. p. 283. That he executed, on or about the 30th day of September, 1884, to David W. Bouldin, for himself individually and as attorney in fact for his mother, Elizabeth A. Watts, and for his brother, J. Howe Watts, and for his sisters, the instrument of date the 30th day of September, 1884, purporting to convey to David W. Bouldin, an undivided 2-3 interest of all their right, title and interest in the certain lands therein described; being the tract described in the 1863 location. Tr. p. 284.

He further testified, that before signing this deed, he had received from his brother and also from his mother and the other heirs, written authority authorizing him to execute the instrument, being general powers of attorney, one from his brother and the other from his mother and the other heirs. Tr. pp. 285-291.

To the question: "What is your recollection as to whether one or both of the instruments were in the form of a letter or in the form of a formal power of attorney?"

he answered: "I am not sure on that point. My impression is that I had both. First letters and then powers executed." Tr. p. 287.

He further testified:

> "I am not able at this time to state whether or not the powers of attorney, that is the formal instrument, from my mother and all the other parties for whom I signed the instrument of September 30th, 1884, except my brother, were acknowledged before a notary or other officer authorized to take acknowledgments." Tr. pp. 286-287.

> Q. Do you remember the contents of the instrument from your brother, J. Howe Watts, as to whether or not the instrument gave you authority to execute the instrument or deed, a certified copy of which is attached and marked "Defendants Wise Exhibit A?" A. "I think it was a general power of attorney." Tr. p. 288.

He further testified, referring to the powers of attorney, that they gave him authority to enter into, execute and deliver such deed or deeds or contracts or conveyances or other instruments, affecting the premises described in the deed of September 30, 1884; that the instruments contained such authority; that the powers of attorney were general in their terms. He could not recall, however, whether or not these powers of attorney were acknowledged.

He further testified, that James W. Vroom, being the same James W. Vroom who is now president of the defendant corporation, Santa Cruz Development Com-

pany, was his attorney in 1899, and had been his attorney, attending to various matters for him, for many years prior to that date. Tr. p. 296.

The Secretary of the Interior decided in July, 1899, that the 1866 location of Baca Location No. 3 was void, and that the claimants were bound by the 1863 selection.

Now, in October, 1899, a few months after this decision, the witness John Watts, for himself, and as attorney in fact for the other heirs of his father, executed to James W. Vroom, his attorney, a deed conveying to **him** an interest in the tract described in the 1863 location. Tr. p. 293.

Watts further testified that prior to executing this deed to Vroom he informed him that he had executed and delivered the prior deed to David W. Bouldin, of date September 30, 1884. He testified:

> "I think I informed said Vroom of that fact both by letter and by conversation." Tr. p. 294.
>
> Q. Did you inform said Vroom any time prior to the execution of said quitclai mdeed, dated October 25, 1899, that you had authority from Elizabeth A. Watts, Fanny A. Bancroft, Mary A. Wardwell, J. Howe Watts, A. L. Bancroft and Attorney Wardwell, to execute for them as their attorney in fact, the said instrument dated September 30, 1884, to the said David W. Bouldin?
>
> A. "Yes sir." Tr. p. 294.

Watts further testified that before executing the deed to James W. Vroom, on October 25, 1899, he delivered a great many papers to him, among others the power of attorney referred to. Tr. 296. On this point Watts testified as follows:

> "Referring again to the power of attorney and letters which I have testified to, pursuant to which I executed the instrument to David W. Bouldin, under date of September 30, 1884, I will state that those papers were delivered to said James W. Vroom; I cannot give the exact date; it was before the execution of said quitclaim deed, dated October the execution of the deed dated October 25, 1899. I could not state definitely what papers were delivered to said James W. Vroom; a great many. Mr. Vroom was here in Newton, and examined personal papers of my father's relating to the subject, and took such as he deemed material or important. My recollection is that he volunteered to place of record the powers of attorney from the parties in whose behalf I signed the said instrument to David W. Bouldin on September 30, 1884; that is, he promised me he would place such powers of attorney of record as were necessary." Tr. pp. 295-296.

Mr. James W. Vroom did not take the stand as a witness in the case. He is the same gentleman who conveyed whatever interest he acquired from the heirs of Watts, to the defendant, Santa Cruz Development Company, by deed dated June 11, 1913. (Santa Cruz Development Company Exhibit 7, Tr. p. 412), and he is now the president of that corporation.

Demand was made by counsel for defendant Joseph E. Wise, upon James W. Vroom, who was admitted to be the President of the defendant Santa Cruz Development Company, that he produce the powers of attorney which the witness John Watts testified to in his deposition. To this demand James W. Vroom answered that he did not have the powers of attorney, or either of them, and never heard of said powers of attorney. Tr. p. 311-312.

However, in view of the sworn testimony of John Watts, and he has no interest in this suit and no occasion to misstate any fact; and in view of the fact that Mr. James W. Vroom did not submit himself as a witness in the case, to be examined and cross-examined under oath; and in view of the great interest of Mr. James W. Vroom in the case, he being the grantor, and President, of the defendant Santa Cruz Development Company; we think the evidence in this case shows that the written powers of attorney which John Watts had, authorizing him to execute the deed of 1884, were obtained by Mr. James W. Vroom, for the purpose of having the same recorded, and that he failed to record the same.

As hereafter we will show, the recording of these powers of attorney was not necessary, under the laws of Arizona, to authorize John Watts to execute the deed of 1884, as attorney in fact for his various principals; nor was it necessary to the validity of these powers of attorney that they be acknowledged. It was sufficient that they were in writing.

On this point, then, we submit: First, that as the deed executed by John Watts, as attorney in fact for the other heirs of his father, is an ancient deed, his power to execute the same is presumed; and second, that the positive testimony of John Watts himself proves that, as a matter of fact, he did have written powers of attorney from said heirs, authorizing him to execute said deed. There is no virtue therefore, in the first contention of defendant Santa Cruz Development Company.

Second point raised by Santa Cruz Development Company, to-wit: That the deed does not recite the authority to John Watts to execute the same, as attorney in fact.

The deed does not, in the body thereof, recite that John Watts is the attorney in fact for the various principals therein named; but it is signed, as heretofore stated, in the name of each principal "by attorney in fact John Watts." Thus, "Elizabeth A. Watts, by attorney in fact John Watts," and so on for each of the principals.

Under the authorities, this is the proper and approved method in which an attorney in fact should execute a deed for his principal.

> "The best form for the execution of sealed instruments, as all others, is to put in the body of the inment the principal's name, and to sign the name of the principal at the end with the agent's name below, preceded by the preposition 'by' and followed by the word 'agent.' "
>
> 31 Cyc., 417, and authorities there cited.

"A deed signed 'A. B.' (the name of the grantor) 'by C. D., his attorney in fact' sufficiently indicates that it was executed on the part of the grantor by an attorney in fact, although there is no recital of the fact in the deed itself."

Tidd v. Rines, 26 Minn. 201, 2 N. W. 297.

Also authorities heretofore cited.

We submit there is absolutely no merit in this contention.

Third point raised by Santa Cruz Development Company, to-wit:

That the power of attorney was not acknowledged or recorded.

The evidence of John Watts himself shows, we think, that the powers of attorney to him were acknowledged. The fact that he gave them to James W. Vroom for the purpose of having them recorded would seem to indicate that they must have been acknowledged; but even if they were not acknowledged, nevertheless, under the laws of Arizona in force in the year 1884, when said deed was executed, acknowledgment of a power of attorney was not essential to its validity. The importance of this question must be our excuse for considering it at considerable lenth, particularly as it involves the construction of old statutes.

Sec. 2245 of Comp. Laws Ariz. 1877, (being the law in force in Arizona when the deed was executed), re-

quires every conveyance of land to be by deed, signed by the person, etc., and acknowledged or proved and recorded. This section is as follows:

> "Sec. 2245. Conveyances of lands, or of any estate or interest therein, may be made by deed, signed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved and recorded as hereinafter directed."

Sec. 2268 of Comp. Laws, 1877, provides that such conveyance is binding and valid between the parties without record. The section is as follows:

> Sec. 2268. **Every conveyance** whereby any real estate is conveyed, or may be affected, proved or acknowledged, and certified in the manner prescribed in this chapter, to operate as notice to third persons, shall be recorded in the office of the recorder of the county in which such real estate is situated, **but shall be valid and binding between the parties thereto without such record."**

Sec. 2270 of Comp. Laws, 1877, provides that any conveyance not so recorded is void as against any subsequent purchaser, in good faith and for a valuable consideration where his own conveyance shall be first recorded. The section is as follows:

> "Sec. 2270. Every conveyance of real estate within this Territory, hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the

same real estate or any portion thereof, where his own conveyance shall be first duly recorded."

Sec. 2271 of Comp. Laws, 1877, requires powers of attorney to be acknowledged or proved, and recorded as **other conveyances.** The section is as follows:

"Sec. 2271. Every power of attorney, or other instrument in writing containing the power to convey any real estate as agent or attorney for the owner thereof, or to execute, as agent or attorney for another, any conveyance whereby any real estate is conveyed or may be affected, shall be acknowledged or proved, and certified and recorded **as other** conveyances whereby real estate is conveyed or affected are required to be acknowledged or proved, and certified and recorded."

Sec. 2273 Comp. Laws, 1877, provides that every conveyance affecting real estate, so acknowledged or proved, may be read in evidence without further proof. The section is as follows:

"Sec. 2273. Every conveyance or other instrument, conveying or affecting real estate, which shall be acknowledged or proved and certified, as hereinafter prescribed, may, together with the certificate of acknowledgment or proof, be read in evidence without further proof."

Sec. 2274 Comp. Laws, 1877 provides that the term "conveyance" as used in the chapter includes "powers of attorney." The section is as follows:

"Sec. 2274. When any such conveyance or instru-

ment is acknowledged or proved, certified and recorded in the manner hereinafter prescribed, and it shall be shown to the court that such conveyance or instrument is lost, or not within the power of the party wishing to use the same, the record thereof, or the transcript of such record, certified by the recorder under the seal of his office, may be read in evidence without further proof."

Under these statutes the Supreme Court of Arizona, in the case of Charouleau v. Woffenden, 1 Ariz., 243, held:

"No acknowledgment of deed is necessary to pass title to the property conveyed by it.

Deed though defectively acknowledged may be given in evidence as against the grantor, or any other party not a purchaser."

Charouleau v. Woffenden, 1 Ariz. 243 (1876).

Section 2247 supra, requiring all conveyances to be acknowledged or proved, is word for word the same as the statute in force in Montana.

In the case of Taylor v. Holter, 1 Mont. 688-712, decided in 1872, that court held:

"A deed which is not acknowledged or recorded is good between the parties."

In its decision in that case the Montana Court said (quoting from pages 710 and 711 of the decision):

"Our statute provides (section 3, p. 396): 'Every conveyance in writing, whereby any real estate is conveyed or may be affected, shall be acknowledged or proved in the manner hereinafter provided.'.....

As between the parties a deed can be enforced without acknowledgment and without record. The acknowledgment is no part of the deed..... The acknowledgment to a deed is no part of the deed, and as between the parties to the instrument a deed is good without acknowledgment and record being required for the protection and benefit of third persons."

Taylor v. Holter, 1 Mont. 699-712.

In the case of McAdow v. Black, 4 Mont. 475, 1 Pac. 751, decided in 1882, that court held, under a statute identical with Sec. 2271 of Comp. Laws of Arizona of 1877, in regard to the acknowledgment and record of powers of attorney, that a power of attorney not acknowledged or recorded was valid as between the mortgagor and mortgagee.

The court on this point said:

"Neither was it necessary that this power of attorney should have been certified, acknowledged and recorded, to have made it good, as between the mortgagor and mortgagee in respect to the mortgage executed in pursuance thereof. The mortgage in question might have been enforced against Black, the mortgagee named therein. He could not have attacked the power of attorney because not acknowledged or recorded. In the case of Tay-

lor v. Holter, 1 Mont. 712, this court held that 'the acknowledgment to a deed is no part of the deed, and, as between the parties to the instrument, a deed is good without acknowledgment, the acknowledgment and record being for the protection of third persons.'

The same rule would apply to powers of attorney. The acknowledgment and record being for the protection of third persons,—that is, for the purpose of notice,—it follows that if third persons have actual notice, a deed or power of attorney, not acknowledged or recorded, would be good as to them in equity."

McAdow v. Black, 4 Mont. 475, 1 Pac. 751.

Again, Section 2276 Comp. Laws of Ariz. 1877 provides, that other proof than by acknowledgment, etc., can be made of a conveyance. The section is as follows:

"Sec. 2276. If the party contesting the proof of any such conveyance or instrument shall make it appear that any such proof was taken upon the oath of an incompetent witness, neither such conveyance or instrument, nor the record thereof, shall be received in evidence until established by other competent proof."

In 1864 California had the same statute. Landers v. Bouton, 26 Cal. on page 406.

The case of Landers v. Boulton, 26 Cal. 393-420, was an action to quiet title. The point was made that

the lower court erred in admitting in evidence a power of attorney under which a deed in the chain of title was executed, for the reason that as the acknowledgment of the power of attorney was void, the power of attorney itself was a nullity, under the statute. The court said:

> "We have carefully examined the several sections of the Act, and are satisfied that a conveyance, as between the parties to it, is valid, and passes the title without acknowledgment or record. And this was the opinion of the Court in Ricks v. Reed, 19 Cal. 553. The acknowledgment is only the mode provided by law for authenticating the act of the parties, so as to entitle the instrument to record and make it notice to subsequent purchasers, and to entitle it to be read in evidence without other proofs. If purchasers neglect to have their deeds properly authenticated and recorded, they will be liable to have their title divested by subsequent conveyances to innocent parties, and to the further inconvenience of being compelled to prove their execution when called upon to put them in evidence."

The court then goes on to quote the statute of California, which is the same as Sec. 2276 of Comp. Laws of Ariz. 1877, supra, and says:

> "Section thirty-one provides that neither the certificate of acknowledgment or of proof, shall be conclusive, but may be rebutted; and section thirty-two, that if it shall be made to appear 'that any such proof was taken upon the oath of an incompetent witness, neither such conveyance or instrument, nor the record thereof, shall be received

in evidence **until established by other competent proof.'**

In such a case the certificate of acknowledgment or proof upon rebutting the **prima facie** case becomes a nullity, as being false or unauthorized, and the deed stands as if there was no certificate. But the deed is nevertheless good under the Act, and when 'established by other competent proof,' is authorized to be received. It is apparent from these several provisions of the Act, that the deed exists as a valid instrument without any acknowledgment or proof; but to entitle it to record, or to be read in evidence without further proof, it must be authenticated in the mode prescribed. (See also, Sections 18, 20.) It would be singular, indeed, if the Legislature should provide that certain proofs made ex parte and certified by any one of a large number of officers, should be sufficient to authorize an instrument in writing to be read as evidence of a conveyance of land, while the same proofs made in open court on the trial of a cause, with the benefit of cross examination, should be insufficient. The question, in our opinion, is one of preliminary proof. If acknowledged or proved in pursuance of the statute, the instrument is admissible without further proof. If not, it must be proved according to the ordinary rules of law applicable to the subject."

Landers v. Bolton, 26 Cal. 393-420.

The court, then, in the decision, shows that a different policy obtains in regard to the conveyances of married women. On this point the court says:

"With respect to the conveyances by married women in this and other States, referred to by counsel, a different policy prevails. For the purpose of protecting her against fraud, coercion and undue influence of any kind, the acknowledgment of the wife is made a part of the deed itself, or perhaps more properly speaking, an indispensable part of the evidence of its execution. To secure perfect freedom of action, the wife must be examined separate and apart from her husband, and even at the last moment the right of retracting is secured to her. It must appear in the certificate of acknowledgment that she stated that she did not wish to retract. In her case, the certificate cannot be made, as in others, upon proof of subscribing, or other witnesses. The acknowledgment in person before the proper officer, and his certificate in the form prescribed by law is the only evidence admissible that she ever executed the instrument. All other proof in Court or out is incompetent. For these reasons the cases cited by appellants' counsel relating to conveyances by married women are inapplicable."

Landers v. Bolton, supra.

In the case of Roper v. McFadden, 48 Cal. 346 (decided in 1874) the court held: "The fact that a power of attorney is not acknowledged or recorded, does not affect its validity."

In that case no statute is cited, the court simply announces the above as law.

"Notice in fact of a deed may operate availably in

equity though the power of attorney under which the deed was made was not deposited with the deed for registration."

Stewart v. Hall, 42 Ky. (3 B. Mon.) 218, 20 Dec.

Dig. Vendor and P., Sec. 228, i.

The law on this subject is thus set forth in Corpus Juris, Vol. 1, 750:

"In the absence of any statutory provision making the acknowledgment an essential part of the instrument, as between the parties it becomes effective, as a transfer of title or otherwise according to its purport, immediately upon its execution and delivery notwithstanding the lack of an acknowledgment, and it binds not only the parties but also their heirs and personal representatives, or, as has been said, the parties and their privies. So a grantor will not be heard to question the validity of the conveyance on the ground that it was not acknowledged by him or proved at the time of its delivery; and the contract may be enforced against him, or on his death, against his administrator in preference to the claims of his general creditors."

Vol. I, Corpus Juris, Sec. 7, p. 750.

The following cases are cited, as applied to powers of attorney:

Williams v. Conger, 125 U. S. 397, 31 L. ed. 778.

Delano v. Jacoby, 96 Cal. 275, 31 Pac. 292.

Springer v. Orr, 82 Ill. 558.

Morris v. Linton, 61 Nebr. 527, 85 N. W. 565.
Tyrrell v. O'Connor, 56 N. J. Eq. 448, 41 At. 674.
"In the absence of any statute to the contrary, an unacknowledged conveyance is good as against all persons having actual notice of its existence, and in some cases statutes declaring unacknowledged conveyances void as against everybody but the grantor and his heirs have been construed as if containing a provision making such instruments valid as against persons with actual notice."

1 Corpus Juris, p. 752, Sec. 8.

Power of attorney. Sufficiency of parol proof of contents of lost instrument.

"It is not necessary, in order to admit evidence of a lost instrument, that the witnesses should be able to tetstify with verbal accuracy to its contents. It is sufficient if they are able to state its substance."

Kenniff v. Caulfield, 73 Pac. 803, 140 Cal. 44.

Collier v. Corbett, 15 Cal. 183.

"The destruction of a power of attorney does not destroy the power. Upon the loss of the paper, there is no reason why its existence should not be shown and the power continued, so as to carry out the object of both the principal and agent.

"In case of a lost instrument where no copy has been preserved, it is not to be expected that witnesses can recite its contents word for word. It is

sufficient if intelligent witnesses who have read the paper, understood its object, and can state it with precision."

Postern v. Rasette & Co., 5 Cal. 467.

In that case the court said:

"The proof was sufficient to establish the existence, loss and contents of the power of attorney, **prima facie.** In the case of a lost instrument, where no copy has been preserved, it is not to be expected that witnesses can recite its contents, word for word; it is sufficient if intelligent witnesses who had read the paper, understood its object, and can state it with precision. Here, two witnesses, both of whom had been accustomed to draw papers of the like kind, and one of whom was a Notary Public, testify to the contetns of the power of attorney, by stating clearly and precisely its object. I have no doubt of the competency of this evidence, and there was no error in admitting it."

Postern v. Rassette & Crozier, 5 Cal. 470.

In the case of U. S. v. Britton, 2 Mason, 464 Fed. Cas. No. 14, 650, Mr. Justice Story said:

"If no such copy exists, the contents may be proved by parol evidence by witnesses who have seen and read it, and can speak pointedly and clearly to its tenor and contents."

Therefore, we submit, that in no event was the validity of the powers of attorney which John Watts had, dependent upon the same being either acknowledged or

recorded and as James W. Vroom, both individually and as President of defendant Santa Cruz Development Company, had notice of these written powers of attorney, both actual notice from John Watts, and constructive notice because the deed was recorded, prior to the execution of any deed to Vroom, or of any deed by him to said Company, the deed from Watts' heirs to Bouldin is good and effective, both as against Vroom and against the said defendant corporation.

Fourth point raised by Santa Cruz Development Company, to-wit: that the deed was not properly acknowledged or proved.

The deed was not acknowledged at the time of its execution, to-wit, September, 1884, but it was signed, sealed and delivered in the presence of two witnesses, to-wit: B. H. Davis, and David K. Osborne, as shown by the deed itself, Tr. p. 279.

Thereafter, and on the 4th day of April, 1888, one of the subscribing witnesses, to-wit: R. H. Davis, acknowledged or proved the instrument before the clerk of the court of El Paso County, State of Texas, in accordance with the laws of Arizona then in force; and having been so proved it was again recorded on the 14th day of April, 1888. Tr. p. 280.

The law in force in Arizona at that date is found in Rev. Stats. of Ariz. 1887, Sec. 2584, p. 445, which is as follows:

"The proof of any instrument of writing for the

purpose of being recorded shall be by one or more of the subscribing witnesses, personally appearing before some officer authorized to take such proof and stating on oath that he or they saw the grantor or person who executed such instrument subscribe the same, or that the grantor or person who executed such instrument of writing acknowledged in his or their presence, that he had executed the same for the purpose and considerations therein stated, and that he or they had signed the same as witnesses, at the request of the grantor or person who executed such instrument; and the officer taking such proof shall make a certificate thereof, and sign and seal the same with his official seal."

Rev. Stats. of Ariz. 1887, p. 455.

The foregoing statute is taken from Texas. Dorn v. Best, 15 Tex. p. 62-67, decided in 1855, sets forth the Texas statute, which is word for word the same as the Arizona Statute of 1887. In construing that statute the Texas court, in Dorn v. Best says:

"The manner in which proof shall be made, of any instrument of writing, to admit it to record, is found in article 2791, Hartley's Digest, l. e.: 'That the proof of any instrument of writing, for the purpose of being recorded, shall be by one or more of the subscribing witnesses personally appearing before some officer authorized to take such proof, and stating on oath, that he or they saw the grantor, or person who executed the instrument, subscribe the same, or that the grantor or person who executed such instrument of writing acknowledged in his or their presence, that he had subscribed and

executed the same for the purposes and consideration therein stated, and that he or they had signed the same as witnesses, at the request of the grantor or person who executed such instrument; and the officer taking such proof shall make a certificate thereof, sign and seal the same with his official seal.' "

"It seems to us obvious that the law just cited makes a distinction in the proof, when the subscribing witness is present and sees the instrument signed, subscribed or executed, and when he was not present at the time, and was subsequently called upon to witness the acknowledgment of the party who executed the instrument. In the first, the direction of the character of the proof is made complete with the words 'subscribe the same.' In the sixth line, before the introduction of the disjunction, or, which introduces the latter or alternative mode of proof; and in this last, the witness to the acknowledgment must be requested to subscribe his name as a witness, by the party acknowledging the same. If this be the true construction of the act on the subject, as the witness was present at the execution of the instrument and subscribed his name as a witness, it is not necessary that he should have sworn that he had been requested by the party executing the same, to subscribe his name as a witness; because the law does not require it unless there be a substantial distinction between the words subscribe and execute the same, which we cannot regard as anything more than verbal criticism.....We believe the authentication of the bond in question was substantially in compliance of the requisition of the first class of proof

called for by the law, and that it ought to have been received by the court below."
15 Tex. p. 65.

The above case is cited with approval and followed in Downs v. Porter, 54 Tex. 59-64, decided in 1880; and in Jones v. Robbins, 74 Tex. 615; 12 S. W. 824.

In the case of Jones v. Robbins, the court said:

"The statute (article 4314) regulating the mode of proof by a witness makes a distinction in those cases where the witness is present, and sees the instrument signed, subscribed, or executed, and those when he was not present at the time, and was subsequently requested to witness the acknowledgment of the party who executed the instrument. In the former, where the witness is present at the execution, and signed as a witness, it is not necessary that he should swear he signed at the request of the grantor. Dorn v. Best, 15 Tex. 65. In the case cited a certificate was objected to upon the ground above stated, and it was similar to the one under consideration, in so far as the proof is made by the witness of the execution of the power of attorney by appellant, W. S. Jones, and it was held to be a valid certificate. See also, Downs v. Porter, 54 Tex. 59; Sowers v. Peterson, 59 Tex. 216. We think the authentication of the power of attorney as to the husband, W. S. Jones, was sufficient. It was not necessary that the witness should have sworn that 'she signed at the request of the grantor,' when she stated that he 'signed and acknowleded the said power of attorney in her presence.' The latter phrase we also believe to be

equivalent to the declaration that she saw the party sign it."

We therefore submit, that this deed from Watts' heirs to Bouldin was duly proved so as to entitle it to be recorded on April 14, 1888, and there is merit in this objection.

Fifth point raised by Santa Cruz Development Company, to-wit: that there was no consideration for the deed, and therefore it was void.

Counsel for Santa Cruz Development Company urged this point in the court below, and assigns as error, being its 10th assignment of error, the ruling of the lower court in sustaining objection of defendants Wise and defendants Bouldin to that part of the evidence of John Watts which is to the effect that neither he, Watts, nor any of the other heirs received any money or other consideration for the execution of said deed.

The deed itself recites, that the grantors, parties of the first part, "for and in consideration of the sum of One Dollar to each and every one of them in hand paid by the party of the second part, receipt whereof is hereby by each and every one of them respectively acknowledged, and for the further consideration, covenants and agreements to be performed by the party of the second part (Bouldin), hereinafter mentioned, and for the purpose of compromising and settling the claims of title between the parties of the first and second parts, and of perfecting and quieting the title to the lands herein described, have granted, bargained," etc.

Three different considerations are recited: (1) The sum of One Dollar to each of the parties of the first part; (2) the covenants and agreements to be performed by the party of the second part, as thereinafter mentioned, and (3) for the purposes of compromising and settling claims of title of the respective parties:

A deed wtihout consideration is good as between the grantor, his heirs, and all other persons, except creditors.

> "As between the parties and those claiming under them, a deed cannot be impeached on the sole ground of want of consideration."
>
> 13 Cyc. 54.
>
> "A deed is good as between the parties even without consideration."
>
> 13 Cyc. 532.

That a consideration is not necessary to the validity of a deed conveying land has been held in the courts of many states.

> Baker v. Wescott, 73 Tex. 129; 11 S. W. 157.
>
> Robertson v. Hefley, 55 Tex. app. 368; 118 S. W. 1159.

A conveyance completely executed will be upheld as against the grantor or his heirs, though not supported by a valuable consideration.

Nicholas v. Shiplett, 43 S. W. 248; 19 Ky. Law. Rep. 1295.

Neither a grantor nor his heirs can impeach a conveyance as voluntary, unless at the time the conveyance was executed the grantor was in such a state of mental weakness as to be incapable of fully understanding the nature and effect of the transaction.

Carnegie v. Diven, 46 P. 891; 31 Or. 366.

"A voluntary conveyance of land, not affecting creditors, made in good faith, and duly recorded, is good against a subsequent purchaser for valuable consideration."

Beal v. Warren, 68 Mass. 447.

Therefore, even if the recital of the consideration of One Dollar, is deemed merely a **pro forma** recital, even so, the deed is good.

One of the actual considerations expressed in the deed, are certain agreements and covenants made therein by Bouldin, wherein he agrees to render services in the way of perfecting the titles, conducting litigation, advancing expenses, etc.

Such an agreement is held to be a valuable consideration, even if the party fails to perform the agreement.

"An agreement to do a thing is a sufficient consideration to support a deed, even though, as a matter of fact, the agreement is never performed."

Gray v. Lake, 48 Iowa, 505.

2 Devlin on Deeds, 2nd ed. Sec. 809.

13 Cyc. p. 531.

In Hartman v. Reed, 50 Cal. 485, the court held:

> "If one conveys to another a tract of land, part of a Mexican grant, in consideration of an agreement by the other to prosecute the claim before the courts for final confirmation, and the grantee fails to fulfill his agreement, the title vests absolutely, and the remedy of the grantor of the breach of the agreement is an action for damages."

In its decision in that case, the court said:

> "It is satisfactorily shown that, in the year 1854, Olvera, by deed of bargain and sale, conveyed to E. O. Crosby the undivided third of the Rancho Cuyamaca; that the only consideration therefor was the agreement of Crosby to prosecute to a final determination before the Board of Land Commissioners and the courts of the United States, the claim of Olvera to the said rancho, and that Crosby failed to perform his agreement. The title to the undivided third of the rancho vested absolutely in Crosby, and his agreement did not constitute a condition, upon a breach of which the title would revest in Olvera; but a breach of the agreement only gave Olvera a cause of action for damages."

In the case of Lawrence v. Gayetty, 78 Cal. 126, the court held:

> "Where a deed conveying an undivided interest in land is executed in consideration of the grantee's oral promise to make certain improvements on the land, and do certain other acts in the future, and their performance is not made a condition subsequent, a mere failure to perform on the part of the grantee does not constitute a failure of consideration so as to entitle the grantor to rescind."

Therefore, the agreement of Bouldin to render services, advance money, etc., was a good and sufficient consideration for the deed.

The third consideration mentioned in the deed is, "for the purpose of compromising and settling the claims of title between the parties of the first and second part," etc.

It appears from the evidence in this case, that prior to the execution of this deed, David W. Bouldin had obtained two deeds from certain persons who purported to be heirs of Luis Maria Baca, conveying to him an undivided 2-3 interest in the tract described in the 1863 location; one dated January 14, 1875, Defendant's Wise Exhibit 15, Tr. p. 267, and the other dated January 14, 1878, Defendant's Wise Exhibit 14, Tr. p. 261; so that Bouldin, under these deeds, was making a rival claim as owner to an interest in Baca Location No. 3, adversely to the heirs of Watts. This adverse claim and asserted right was compromised, by the execution by the heirs of Watts to Bouldin of the deed of 1884, in which Watts heirs conveyed to Bouldin, an undivided two-thirds of all

their right, title and interest, not only in Location No. 3, but also in other tracts of land inherited by them from their father, and in the deed Bouldin, on his part, agreed that their heirs should be the owners of an undivided 1-3 interest therein.

In the case of St. Louis v. U. S. the Supreme Court of the United States specifically upheld the validity of a deed, on the very ground that the consideration therefor was the compromise of a question of title. After reviewing all the facts the court said:

> "In short, we are of opinion that the deed of Carondolet is valid, as based upon an equitable compromise of a long pending and doubtful question of title, and that it excludes the plaintiff in this suit from any relief."

St. Louis v. U. S. 92 U. S., 462-467, 23 L. ed. 731.

"A deed of land, given in settlement of a claim of title to a greater tract, has a sufficient consideration, though the claim prove not as good as supposed."

Jones v. Gotleff, 113 S. W. 436.

In the case of Bartlett v. Smith, 17 Fed. 668, the court held that the settlement or compromise of a litigated question is a valid consideration for a conveyance of land.

"A compromise of a doubtful right is a sufficient consideration for a deed."

Rice v. Baxter, 1 Watts & S. (Pa.) 445.

We submit there is no merit in the point raised by Santa Cruz Development Company that the deed from the Watts heirs to Bouldin was void for want of consideration.

Sixth point raised by Santa Cruz Development Company, to-wit:

That the instrument is not a deed, but an executory contract to convey. This point requires a consideration of the deed itself.

The words of grant contained in the deed are as follows: "have granted, bargained and sold, and by these presents do grant, bargain, sell and convey unto the party of the second part, and to his heirs and assigns forever," etc. Tr. p. 273.

Then follows the description of the lands, in which Location No. 3 is specifically described, in accordance with the description in the 1863 location, and other property.

Then comes the habendum clause, as follows: "To have and to hold, all and singular and undivided two-thirds of the above described land * * * or in any wise pertaining * * * to the undivided two thirds part thereof." Tr. p. 276.

Then comes the following, which is most important as showing how the parties interpreted the instrument themselves, to-wit: "it being understood and agreed that this is a quitclaim title and that the parties of the first

part are not to be responsible to the party of the second part for the failure of title, or any part thereof." Tr. p. 276.

Then follows a provision: "That if, in the event of the settlement of the title to the above described premises, with other claimants of said lands, the parties of the first part should become entitled to moneys or other property in lieu of said lands, or any part thereof, by reason of any sale or other transaction made by their ancestor John S. Watts, deceased, then and in that event the two thirds part of said money or other property **is hereby conveyed and assigned to the party of the second part."** Tr. p. 276-277.

The deed is not only a present grant of an undiivded two-thirds interest in the lands described therein; but it is also a present conveyance and assignment of two thirds of any moneys or other properties to which the parties of the first part should become entitled by reason of any sale or other transaction of their ancestor.

Bouldin, on his part, therein agrees to perform certain services; then follows a provision to the effect that upon a final and complete settlement of the titles to said lands, the parties of the first part are to have, own and possess in fee an undivided 1-3 of the net lands recovered and 1-3 of the moneys. Tr. p. 277-278.

This is a very important provision in contruing the deed, for it makes manifest that the grantors considered that they had, by most positive language, granted

and conveyed two thirds of the lands therein described, as well as two thirds of all money or other property that might be realized in the settlement of various claims; and therefor, they only provided that upon the final and complete settlement of all matters, **they, the heirs, should receive 1-3 thereof.**

There is no provision that upon such a settlement Bouldin should receive two thirds of such moneys or other property. The reason there is no such provision is clear, namely, because the heirs had, by positive words of grant and conveyance, as theretofore set forth in the deed, absolutely granted, assigned and conveyed to Bouldin an undivided 2-3 interest, and there was nothing left for them to convey to him, as to that undivided 2-3 interest.

At the end of the instrument follows, as an independent transaction, the execution of a power of attorney to Bouldin, **to take possession of the whole of the above described lands,** and to receive the rents, and so forth. Tr. p. 278.

As the heirs of Watts retained an undivided 1-3 intertest in the lands conveyed by them to Bouldin, it was necessary that they empower him, as their attorney in fact, to have full control of their undivided 1-3 interest; and for this manifest purpose the power of attorney was executed. The mere execution of this power of attorney in no way conflicts with the prior absolute grant to Bouldin of the undivided two thirds interest in the lands therein described.

If there were any doubt as to whether the instrument is a present grant, or an executory contract hereafter to convey, that doubt would be dispelled by the construction of the intent, which the parties themselves make in the instrument. In the deed itself the parties say, as heretofore quoted: "it being understood and agreed that this is a quitclaim title, and that the parties of the first part are not to be responsible to the party of the second part for the failure of title, or any part thereof."

In the case of Morrison v. Wilson, 30 Cal. 344-348, supra, the question presented was whether or not a deed containing as words of conveyance "has granted, bargained, sold and hereby conveys," in which at the end of the deed was the following sentence, "it is fully understood that as to title this is only a quitclaim deed," the court held:

> "Contracting parties have the power to define the words which they use in the contract, and if the agreed definitions are free from ambiguity the contract will be enforced according to the definition thus assigned."

And the court held that the language in the deed made it a quitclaim deed, by virtue of the provisions of the parties therein to that effect.

And so, if there were any question as to what the parties meant, or intended, in the deed from Watts' heirs to Bouldin, on September 30, 1884, the provision therein, that what was conveyed was a quitclaim title, would

conclusively show that the deed was an absolute conveyance; and was neither an executory contract, thereafter to be performed, or anything else than a deed conveying a present interest.

We therefore submit as to this point, that a mere reading of the deed, from the Watts heirs to Bouldin, shows that it was a deed of present grant, bargain and sale, limited by agreement of the parties, as conveying only a quitclaim title; that this deed did convey or quitclaim a present two thirds of all the interest of the heirs of Watts to Bouldin, and was no executory contract.

And, as to each and all of the objections made to this deed, by defendant Santa Cruz Development Company, and no other party to this action raised the specific objections raised by said Company, we submit, that these objections are without merit; and that the instrument is a valid deed, conveying to David W. Bouldin an undivided 2-3 interest of whatever interest the grantors therein, heirs of John S. Watts, had, on September 30, 1884, the day the deed was executed.

And we further submit, that said deed was properly received in evidence by the court; or, should this court hold that the transcript of the record in this case discloses that any objection to it was sustained, that the sustaining of any such objection was error, and that the deed should have been received in evidence.

ASSIGNMENT OF ERROR VIII.

The court erred, after admitting in evidence an exemplified copy of the judgment and proceedings in a certain case, entitled in the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, John Ireland and Wilbur H. King, plaintiffs, vs. David W. Boulin, defendant, and later Leo Goldschmidt, administrator of the estate of David W. Bouldin, deceased, defendant, etc., being Defendants Wise Exhibit 19, Tr. p. 456-498, subject to the objections of defendants Bouldin and plaintiffs, in thereafter, and after Defendant Wise had rested his case, sustaining said objections.

Upon the trial of the case, appellant Joseph E. Wise offered in evidence a duly exemplified copy of the judgment and all proceedings, in the case of John Ireland and Wilbur H. King vs. David W. Bouldin, in which case a judgment was rendered foreclosing an attachment lien upon all the interest of David W. Bouldin, in Baca Location No. 3, according to the 1863 description, and ordering the same to be sold; the sale thereof by the sheriff; the confirmation of sale, etc., being "Defendants Wise Exhibit 19." Tr. pp. 456-498.

This judgment and proceedings was material evidence to show that the interest which David W. Bouldin had acquired from the heirs of Watts had been sold under a judgment and order of the court, by the sheriff, to Wilbur H. King, and had vested title in him as purchaser at the sale, no redemption having been made; also to prove

the authority of the sheriff to execute the deed to King, which thereafter he did execute; also to show the subsequent confirmation of sale, etc. The record and proceedings are all in one document, being collectively Defendants Wise Exhibit 19, Tr. p. 456-498.

To the introduction in evidence thereof defendants Bouldin objected on the following grounds:

1. That the court had no jurisdiction to enter that particular judgment, insofar as the judgment undertakes to foreclose the attachment lien and order a sale of the property by the sheriff.

2. That the judgment is void because there was not in the complaint, or any amendment thereof, a waiver of recourse against other property of the decedent, Bouldin.

3. That there are minor errors of description of the property in the judgment.

4. That the notice of sale given by the sheriff does not state he will sell the attached interst, but gives notice that he will sell the interest of defendant Goldschmidt, administrator, and such interest as Bouldin had at the time of his death.

5. That the return of sale shows that no valid levy was made under the execution and judgment.

6. That the return of the sheriff also shows that he sold the interest of Leo Goldschmidt, administrator.

7. That the return shows two courses east in the description of the property, which is attempted to be ac-

cording to the 1863 location, and does not tie to any place.

8. They further objected to that part of the proceedings as proceedings of the Superior Court of Pima County, in that they are entitled in the case of John Ireland and Wilbur H. King vs. David W. Bouldin, and Goldschmidt was the defendant in the action; that the papers are entitled as the case was when it was first filed in the District Court.

9. That the said order made by the Superior Court of Pima County, directing John Nelson, Sheriff, to execute a deed, was without jurisdiction; that it was an **ex parte** proceeding in which service was made upon no one; and upon the further ground that the court had no power or authority to direct the sheriff of Pima County, to convey land in Santa Cruz County, if it otherwise had power in the premises.

Upon these objections the court ruled at the time as follows:

THE COURT: "It may be received subject to the defendants' objection."

MR. NOBLE: "If the court please, may it be understood that we make the same objections without restating them?"

THE COURT: "Yes, and the same ruling." Tr. p. 317.

Thereafter, and after the court had ruled that the deed from John S. Watts to Hawley conveyed all the interest

which John S. Watts had acquired under the deeds from the Baca heirs of 1864 and 1871, it sustained these objections. Tr. 438-439, to which ruling defendants Wise excepted.

The objections made by defendants Bouldin and plaintiffs can be grouped under three heads:

1. The jurisdiction of the court to render the judgment. 2. The validity of the sale made by the sheriff, as shown by the sheriff's return thereof, and 3. The jurisdiction of the court to confirm the sale and direct execution of curative deed by the sheriff.

We will first briefly state the material part of the judgment and proceedings as disclosed by the record in that case, and then consider the objections made by defendants Bouldin and sustained by the court.

Defendants Wise Exhibit 19, the judgment and proceedings aforesaid, contains the following instruments and records:

1. March 13, 1893: Complaint filed by John Ireland and Wilbur H. King against David W. Bouldin before the District Court of the First District of the Territory of Arizona, for Pima County, to recover $5,000, attorneys' fees and interest; summons and writ of attachment issued. Tr. pp. 456-458.

2. March 14, 1893, Sheriff's levy of writ of attachment on Location No. 3, selected under Act of Congress of June 12, 1860, and referring to records in office of

County Recorder for further and better description. Tr. p. 464.

3. May 10, 1893. Answer of Bouldin filed. Tr. p. 466.

4. April 20, 1895, Appointment of Leo Goldschmidt as Administrator of the estate of David W. Bouldin, deceased, by Probate Court of Pima County, Arizona, and issuance of Letters of Administration to him. Defendant Wise Exhibit 21, Tr. p. 318, also p. 506.

5. April 20, 1895. Minute entry of said District Court substituting Leo Goldschmidt, Administrator of the Estate of David W. Bouldin, deceased, as defendant in before mentioned suit. Defendants Wise Exhibit 20, Tr. p. 498.

6. May 2, 1895. Judgment of said District Court as follows:

"This cause came on regularly for trial on the 2nd day of May, 1895, Francis J. Heney appearing as counsel for plaintiffs and Leo Goldschmidt administrator of the estate of David W. Bouldin, deceased, appearing in his own proper person as the defendant in said cause, by reason of the death of said David W. Bouldin, having been suggested to the court and said Leo Goldschmidt as such administrator having been substituted as defendant in said cause by order of the above entitled court. A trial by a jury having been expressly waived by the respective parties, the cause was tried before the court sittin without a jury, and witnesses were duly sworn and examined and evidence was introduced, and it having

been clearly proved that the claim sued upon had been duly and properly filed with said administrator, Leo Goldschmidt, after he had duly qualified as such administrator and during the pendency of this action, and it further appearing that he had rejected the same, the cause was submitted to the court for consideration and decision; and after due deliberation thereon the court finds all the issues for the plaintiffs.

Wherefore it is ordered, decreed and adjudged that John Ireland and Wilbur King, the plaintiffs, do have and recover from Leo Goldschmidt, as administrator of David W. Bouldin, deceased, the sum of eight thousand five hundred and fifty dollars, with interest thereon at the rate of ten per cent per annum, from the date hereof until paid, together with plaintiffs' costs and disbursements incurred in this action, amounting to the sum of $34.45, and that said amount be paid by said Leo Goldschmidt, administrator, in the due course of the administration of the estate of David W. Bouldin, deceased.

And it further appearing to the court that a writ of attachment heretofore duly issued in this cause was on the 14th day of March, 1893, duly levied upon all of the right, title and interest of David W. Bouldin in and to the following described real estate, lying, being and situate in the County of Pima, Territory of Arizona, to-wit, Location No. three (3), being one of five tracts of land selected and located by virtue of and in accordance with the provisions of the sixth section of an act of Congress of the United States approved June 21, 1860, entitled "An act to confirm certain private land claims in New

Mexico," and found in volume 12, page 72, of the United States Statutes at Large, said location being described as follows: situated in the Territory of Arizona, formerly Dona Ana County, New Mexico, beginning at a point one mile and a half from the Salero mountain, in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and thirty-four links; thence east twelve miles, thirty-six chains and thirty four links; thence north twelve miles, thirty six chains and thirty four links to the place of beginning, and containing ninety-nine thousand two hundred and nine acres, and thirty nine hundredths of an acre, more or less.

And it further appearing to the court that said attachment lien should be foreclosed, and that all of said property, or a sufficiency thereof, should be sold to satisfy said judgment;

Now therefore, it is ordered, decreed and adjudged that the said attachment lien as the same existed on the 14th day of March, 1893, be and the same is hereby foreclosed, and that an order of sale be issued by the clerk of this court, under the seal of this court, directed to the Sheriff of the County of Pima, Territory of Arizona, directing him to seize and sell as under execution, for the purpose of foreclosing the said attachment lien, the right, title and interest of said David W. Bouldin in the above described property, as the same existed on the 14th day of March, 1893, or so much thereof as will be necessary

to satisfy the said judgment with costs and costs of said sale. J. V. Bethune, Judge. Done in open court this 2nd day of May, 1895." Tr. pp. 468-471.

7. August 6, 1895. Return of Sheriff, Robert N. Leatherwood, on order of sale, dated July 3, 1895, amongst other things recites:

"And I further certify that under and by virtue of said Order of Sale, I did advertise said real property for sale, by posting notices of said sale in three public places, one of which was at the court house door and also by advertisin in the "Citizen," a daily newspaper of general circulation published in the City of Tucson, Pima County, Arizona Territory, a copy of which is hereto attached, from the 8th day of July, 1895, until the 31st day of July, 1895, daily and successively. And I further certify that I did attend at the hour, time and place advertised for sale and offered for sale a part of said property for sale and received no bid. I then offered two parts of sale property for sale and received no bid. I then offered three parts of said property for sale and received no bid, then I offered the whole of said property for sale, and received a bid of Two Thousand Dollars ($2000.); that being the highest and best bid offered in lawful money of the United States, the said property was sold to Wilbur H. King." Tr. pp. 472-474.

The notice of sale, referred to and annexed to the sheriff's return, recites, among other things:

"Notice of Sheriff's Sale. John Ireland and Wilbur H. King vs. Leo Goldschmidt, Administrator of the Estate

of David W. Bouldin, deceased. Under and by virtue of an execution and order of sale issued out of the District Court of.....on the 3rd day of July, 1895, and to me as sheriff duly directed and delivered, on a judgment rendered in said Court in the above entitled action, on the 2nd day of May, 1895, for the sum of $8584.45, with interest thereon at the rate of ten per cent per annum, until paid, together with the foreclosure of plaintiffs' attachment lien upon the property in Pima County, Territory of Arizona, upon which I have duly seized and levied and in said order of sale described as" (here follows same description as in the judgment) **"as said attachment lien existed on the 14th day of March, A. D. 1893."**

Public notice is hereby given that I will at..... on the 3st day of July, 1895, sell at public auction.... all the right, title and interest, both legal and equitable of the above named defendant, in and to the above described property, and all the right, title and interest said David W. Bouldin, deceased, had at the time of his death, in, of and to the above described property, or so much thereof as may be necessary to satisfy said judgment and costs of suit and all accruing costs. Dated July 8, 1905, R. N. Leatherwood, Sheriff." Tr. p. 474-476.

Note: David W. Bouldin died December, 1893. Tr. p. 148.

8. September 30, 1914. Joseph E. Wise, assignee and grantee of Wilbur H. King, purchaser at the sale, filed a verified petition in said case, in the Superior Court of Pima County, State of Arizona, the successor of the said

District Court of the Territory of Arizona, wherein, amongst other things, he recites all of the foregoing proceedings, the sale and assignment to him by Wilbur H. King, of all the interest acquired by King at said Sheriff's sale; that the deed executed thereunder by Wakefield, Sheriff, aforesaid, by inadvertence or mistake only purported to convey the right, title and interest which Leo Goldschmidt, Administrator of the estate of David W. Bouldin, deceased, had at the date of said sale, and did not recite that the same conveyed the interest of said Bouldin, which had been attached and foreclosed under said judgment; that there were other mistakes and discrepancies in said deed, and that it was necessary a new deed be executed by the Sheriff of Pima County. Wherefor, he prayed that John Nelson, the then sheriff of Pima County, be authorized and directed to execute to him, as grantee of King, a proper deed, and for such other and further orders as may be meet in the premises. Tr. p. 480-487.

9. September 30, 1914. Upon this date, the said Superior Court of Pima County, in said case aforesaid, upon the petition of Joseph E. Wise aforesaid, made and entered an order reciting, among other things:

"Upon the reading and filing of the petition of Joseph E. Wise herein, and an inspection of the records of this court in the above entitled case, and it appearing to the court from the said record that," (here follows full findings of the bringing of the suit, levy of attachment, appearance of Bouldin, the substitution of his administra-

tor, the judgment, order of sale, return of sheriff, sale mistakes of the sheriff's deed, etc.) "and it further appearing that said Joseph E. Wise, as the grantee and successor in interest of said Wilbur H. King, the purchaser at said sale, is entitled to have executed to him by the Sheriff of Pima County, as successor of the sheriff of Pima County, Territory of Arizona, who made said sale, a deed which properly conveys to him, as the grantee and successor in interest of the said Wilbur H. King, all of the right, title and interest in said property, so foreclosed by the said judgment and decree of this court, and so sold by the said sheriff at the said sale aforesaid, and so purchased by said Wilbur H. King."

"Now, therefore," and here follows the order of the court authorizing the then sheriff of Pima County, John Nelson, to execute, acknowledge, and deliver to said Wise, his deed as such sheriff, conveying to Wise, all of the right, title and interest in and to the property so sold at the sheriff's sale, aforesaid, etc. Tr. p. 489-496.

The first objection of defendants Bouldin is, that the court had no jurisdiction to enter that particular judgment, insofar as the judgment undertakes to foreclose the attachment lien and to order a sale of the property by the sheriff.

The record shows that Bouldin in his lifetime appeared and filed an answer in the action. This gave the court jurisdiction over him. After his death his administrator was substituted as defendant. The judgment recites that this administrator appeared in his own proper

person at the trial, and expressly waived a trial by jury, etc. So the court had jurisdiction over him.

The real property of Bouldin having been levied on during his lifetime, the court also had jurisdiction over the property itself. The court having jurisdiction over the parties and the subject matter, its judgment is not subject to collateral attack.

> "Where a court has jurisdiction of the parties and the subject matter in the particular case, its judgment, unless reversed or annulled in some proper proceeding, is not open to attack or impeachment by the parties or their privies in any collateral action or proceeding whatever."
>
> Black on Judgments, Vol. 1, Sec. 245.
>
> McGoon v. Scales, 9 Wall. 23-32; 9 L. ed. 545.
>
> "Where a court has jurisdiction of the parties and the subject matter, its judgment, although irregular in form or erroneous or mistaken in law, is conclusive as long as it remains unreversed and in
>
> force, and cannot be impeached collaterally."
>
> 23 Cyc. 1090;
>
> Cooper v. Reynold's Lessee, 10 Wall. 308;
>
> Voorhees v. Jackson, 10 Pet. 449;
>
> Mansen v. Duncanson, 166 U. S. 533; 41 L. ed. 1105.

The point urged by defendants Bouldin is, that the death of David W. Bouldin dissolved the attachment levied in the suit, and the court had no power to decree a foreclosure of the attachment lien, and order the property sold.

This objection does not go to the jurisdiction of the court. It questions, not the power of the court to render the judgment; but the correctness of the judment it did render. Such a question cannot be raised on collateral attack.

There is no merit in the objection for another reason, namely, that in Arizona death does not dissolve an attachment lien.

The attachment statute in force in Ariozna in 1893, and ever since, provides that the levy of an attachment creates a lien on the real estate levied on; and that if the plaintiff recover in his suit **the court shall direct the sale of the real estate levied upon to satisfy the judgment.** The statute is as follows:

> 67 "The execution of the writ of attachment upon any property of the defendant subject thereto, unless the writ should be quashed or otherwise vacated, shall create a lien from the date of such levy on the real estate levied on.
>
> 68. "Should the plaintiff recover in the suit, the court shall direct the proceeds of the personal property sold, to be applied to the satisfaction of the judgment, and the sale of the personal property re-

maining in the hands of the officer and of the real estate levied on to satisfy the judgment."

Rev. Stats. of Ariz. 1887, par. 67 and 68.

The statute of Arizona authorizing the substitution of the administrator for Bouldin, upon his death, is as follows:

"An action shall not abate by the death or other disability of the party, or by the transfer of any interest therein, **if the cause of action survive or continue.** In case of the death or disability of a party the court on motion, may allow the action to be continued by or against his representative or successor in interest."

Rev. Stats. Ariz. 1887, Sec. 725.

The foregoing statutes are taken from Texas. In a Texas case, decided in 1893, where the Texas statute is set forth and fully considered, the court held:

"An attachment does not abate, nor is its lien lost, by defendant's death, after the levy of the writ, and before rendition of judgment."

Rodgers v. Burbridge, 24 S. W. 300, 302.

The Supreme Court of Arizona has likewise held that death of the defendant does not dissolve an attachment lien; and such is the settled law in this state.

Watman v. Pecka, 8 Ariz. 8-15; 68 Pac. 534.

In that case the court said:

"The appeal in this case raises but one question: Does the death of a defendant after suit brought, and after the levy of an attachment has been consummated upon his property, **ipso facto** dissolve the lien of such attachment? * * *

An examination of the Probate Act has satisfied us that the power to foreclose an attachment lien remains in the district court, notwithstanding the death of the defendant, and that there is no real difficulty in reconciling the provisions of the Probate Act with this view."

Watman v. Pecka, 8 Ariz. 8-15; 68 Pac. 534.

In this decision the Arizona court disapproves the case of Myers v. Mott, 29 Cal. 359, which holds, (perhaps under a different attachment statute) a contrary view.

And such is the law generally.

"Although there are decision to the contrary in some jurisdictions, the weight of authority is to the effect that an attachment is not dissolved by the death of either plaintiff or defendant unless a statute expressly so declares."

1 Corpus Juris, par. 403, p. 208.

Therefore, if the question presented were one of jurisdiction, which it is not, even then, under the established law in Arizona, the death of Bouldin did not dissolve the attachment and the court had jurisdiction to enter its judgment foreclosing the same and ordering the attached property sold to pay the debt found due.

Therefore, upon the trial of the case now on appeal, the lower court erred in sustaining this objection of defendants Bouldin to the introduction in evidence of the judgment and record, under which the interest of David W. Bouldin in the property was sold; for it was competent and material evidence to prove the power and authority under which the sheriff subsequently sold the property to King and executed a sheriff's deed therefor.

The second objection raised by the Bouldin heirs is, that the judgment is void because there was not, in the complaint, or any amendment thereof, a waiver of recourse against other property of the deceased Bouldin.

This manifestly is a question which goes to the sufficiency of the complaint, and could only be raised by demurrer. It in no way affects the jurisdiction of the court.

But if it did, then we call attention to the recital in the judgment, wherein the court finds that the claim sued upon had been duly and properly filed with said administrator, Leo Goldschmidt, during the pendency of this action, and that he had rejected the same. Tr. p. 468.

The statute specifically gives the right to sue the administrator when a claim is rejected by him; and this right is based upon the rejection of the claim, and not upon any waiver of recourse against other property of the deceased estate. There is no merit in this objection.

The third objection raised by defendants Bouldin is,

that there are minor errors of description of the property in the judgment.

Such an objection merits no consideration; and if it did, we would simply state that the errors referred to are trivial; and taken altogether, the description of the tract of land in the judgment, is a correct and specific description of the tract described in the 1863 location.

The fourth, fifth, sixth and seventh objections made by defendants Bouldin are to the return of the sheriff, and to the notice of sale. All of these objections relate to the return of the sheriff and will be considered together.

The return of the sheriff does show that an order of sale was made, under the judgment of the court, directing him to sell the property foreclosed; that the sheriff gave notice of the time and place of sale as required by law; that at that time and place he offered for sale, at public auction, the property in the notice and judgment described; that the notice of sale specifically states that the judgment was for "the foreclosure of plaintiff's attachment lien on the following described property.... as said attachment lien existed on the 4th day of March, A. D. 1893;" that he sold said property at said sale to Wilbur H. King, the highest and best bidder therefor; and that the property was sold to Wilbur H. King. Tr. p. 472.

The objections raised to this return of the sheriff do seem too trivial to require consideration; but they were made; they were sustained by the lower court, when it sustained the objections made; and we are compelled briefly to refer to them.

The objection that the notice of sale stated that the sheriff would sell, not the interest Bouldin had on March 14, 1893, when the attachment was levied, but the right, title and interest which Bouldin had at the time of his death, in no way affects the validity of the sale. It might involve the question as to what interest **was** sold; the interest that Bouldin had in March, 1893, or the interest he had at the time of his death; but that is all.

David W. Bouldin died December, 1893, eight months after the levy of the attachment. His heirs could only inherit the title he had at the time of his death. If that interest was sold by the sheriff, it is immaterial to them whether or not that sale also conveyed the interest Bouldin had at the time of the attachment, which was eight months before his death. They are not interested in that question; for in no event could they inherit any greater interest than David W. Bouldin had at the time of his death.

The next objection is that the return of sale shows no valid levy under the execution and judgment. The levy was made by a levy of the writ of attachment. The property was in the custody of the court by virtue thereof at the time of the judgment, and the lien being foreclosed and the property ordered sold no further levy was necessary. The levy was made under the writ of attachment, not under the order of sale.

The attachment statute of Arizona, heretofore quoted, specifically provides that the court, upon foreclosing an attachment lien shall order the real estate to be sold. The

sale is then made under the judgment of foreclosure.

As was said by the court in the case of Holter Hardware Co. v. Ontario Mining Co., 24 Mont. 184; 61 Pac. 3:

> "An attachment having been levied within the life of the writ, a lien is created which may be enforced by execution sale, without further levy * * * When property has been attached under a writ of attachment, there is no occasion for levying thereon a writ of execution. The lien acquired by the attachment is sufficient."

The next objection is that the return shows that the sheriff levied upon the interest of Goldschmidt, administrator, and nothing else.

But, as above stated, no levy was necessary, and the mere recital of the sheriff that he levied on the interest of the administrator is mere surplusage, and in no way invalidates the sale.

In this return, the sheriff, after describing the property, certifies as follows:

> "And I further certify that under and by virtue of said Order of Sale, I did advertise said real property for sale by posting notices of said sale in three public places and by advertising in the 'Citizen' * * * a copy of which is hereto attached * * * And I further certify that I did attend at the hour, time and place advertised for said sale and offered for sale a part of said property * * * then I offered

the whole of said property for sale * * * the said property was sold to Wilbur H. King." Tr. p. 474.

What property did the sheriff sell? Manifestly the property which he advertised for sale in the notices posted and published, a copy of which notice is attached to his return. He so stated in his return.

A copy of this notice is attached to the return. In this notice of sale the Sheriff recites that under the Order of Sale issued under the judgment of the court for $8584.45 together with the foreclosure of plaintiff's attachment lien upon the following described property, "upon which I have duly seized and levied, and in said order of sale described as (here comes full description of the property) "as said attachment lien existed on the 14th day of March, A. D. 1893."

"Public notice is hereby given that I will sell at..... all the right, title, claim and interest, both legal and equitable, of the above named defendant, of, in and to the above described property, and all the right, title and interest, both legal and equitable, which said David W. Bouldin, deceased, had at the time of his death, in, of and to the above described property. * * *" Tr. pp. 474-476.

The property he advertised for sale, manifestly from the reading of the notice itself, was all the right, title, and interest in the property therein and in the order of sale described, which David W. Bouldin had at the time of his death.

And this property, so advertised, the sheriff, in his return, certifies he sold to Wilbur H. King.

The objection of defendants Bouldin, that the sheriff only sold the interest of the administrator, is not supported by the record itself; and there is absolutely no merit in that objection.

The last objection is that in the return of the sheriff is a mistake in description in regard to one of the courses. However, as the notice of sale itself is part of the return, and this mistake does not appear in the notice, there is nothing in this objection. The description in both the return, and the notice of sale annexed thereto, contain a correct description of the property foreclosed, ordered sold and actually sold by the sheriff.

We therefore submit that there is no merit whatsoever in any of these objections to the sale so made by the sheriff, and the return of sale of the sheriff, which was part of the court proceedings which defendants Wise offered in evidence; and the court erred in sustaining any of these objections thereto.

The eighth and ninth objections of said defendants, refer to the order of the Superior Court of Pima County, made in the case, confirming the sale and directing the sheriff to execute a deed.

Upon the trial of the case defendant Wise introduced in evidence, as a separate exhibit, the sheriff's certificate of sale executed to Wilbur H. King, dated July 31, 1895,

being Defendants Wise Exhibit 22, Tr. p. 319, also p. 513.

He also introduced in evidence, as a separate exhibit, the sheriff's deed to King, dated January 16, 1899, executed by the sheriff, no redemption from the sale having been made. Defendants Wise Exhibit 23, Tr. 319, also p. 515.

Now, by reason of certain inaccuracies and mistakes in this sheriff's deed, defendant Joseph E. Wise, as the assignee and grantee of King, thereafter, and on the 30th day of September, 1914, filed a petition in the Superior Court of Pima County, Arizona, the successor of the territorial district court, in the said case of Ireland and King vs. Bouldin, and Goldschmidt, administrator, wherein he recites the judgment, order of sale, sale, issuance of certificate of sale to King, execution of sheriff's deed to King, and deed and assignment from King to him; and also recites that the sheriff's deed was defective in that it purported only to convey the interest of Leo Goldschmidt, administrator, in the lands described therein, and not the interest which was sold at the sale, to wit: the interest of David W. Bouldin; and he prayed for an order of the court, authorizing and directing the sheriff of Pima County to execute to him a new deed to correct the defects in the old one.

No notice was given of this application; it was purely an **ex parte** matter. The Superior Court, on the same day, made an order in which it recited and found, upon inspection of its own records, that a valid sale had been

made by the sheriff to Wilbur H. King; that the deed executed was defective, and it did then order John Nelson, the then sheriff of Pima County, as successor of the sheriff who made the sale, to execute a deed to Joseph E. Wise, assignee of King, purchaser at the sale, conveying to him the property so sold, the deed from the former sheriff being defective in form.

If the court had jurisdiction to make this order, then the order is not subject to collateral attack. The order made is in the nature of an order confirming a sale; in fact it is an order directing the sheriff to execute a good deed to the purchaser at a sale made by order of court, to cure errors in the deed that was made. The only question is whether or not the court had jurisdiction to make such order, no notice having been given of the application therefor, to Leo Goldschmidt, administrator, the defendant in the action.

The question, whether or not notice of the application should be given to Goldschmidt, administrator, is not a jurisdictional question; it is purely a matter of practice which the Superior Court itself had jurisdiction to decide.

If the court had jurisdiction to render the judgment ordering the sale, and we have shown that it had; then that jurisdiction continued until its order was fully carried into effect by the execution of a proper deed to the purchaser; and the court had jurisdiction, on its own initiative, to order its officer properly to carry out and ex-

ecute its decree. Its power in that regard did not depend upon notice to the defendant.

It was not the notice to Goldschmidt, administrator, which gave the court jurisdiction to confirm the sale, or to direct the sheriff to execute a proper deed, a valid sale having been made; it was the jurisdiction which the court had theretofore acquired to render the judgment and to order the property sold, which gave it jurisdiction to carry its own judgment into effect. As the court had jurisdiction to render the judment, it also had jurisdiction to carry that judgment into effect by ordering a proper deed to be executed by the sheriff. Any order of this nature, being within the court's jurisdiction, is not subject to collateral attack.

Goldschmidt, administrator, had no interest in the matter, for the reason that all the title of Bouldin, deceased, had been sold, and the time for redemption had expired. An application for the execution of a proper deed was not a matter of which notice to him was necessary, or a matter in which he had any right to be heard.

> "However, after the execution sale, and the expiration of the redemption period, the judgment debtor has no such interest in the land as will entitle him to raise objections to the completion of the same by the execution of the deed, he then occupying the position of a mere stranger."
>
> 17 Cyc., 1342, and authorities there cited.

This order, then, of the Superior Court, being within its jurisdiction, to carry into effect its judgment or de-

cree, is not subject to collateral attack, any more than the judgment itself.

> "Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceedings, being **coram judice,** can be impeached collaterally only for fraud."
>
> McNutt v. Turner, 16 Wall., 352-366.
>
> Voorhees v. Bank, 10 Peters, 449.

As said by this Honorable Court, in the case of National Nickel Co. v. Nevada Nickel Syndicate, 50 C. C. A., 115, 112 Fed., 44-48:

> "No appeal was taken by the plaintiffs in error from the decree of foreclosure, or from the order confirming the sale. There has, therefore, been a final determination of all the issues of that case, and one of the issues so determined was the regularity of the proceedings, resulting in the sale of the property."

The order, therefore, of the Superior Court, directing the then Sheriff of Pima County to execute a curative deed to Wise, assignee of King, is not subject to collateral attack, and there is no merit in defendants Bouldin's objection to that order of the court.

This disposes of the objections raised by defendants Bouldin to the introduction in evidence of the judgment and proceedings, Defendants Wise Exhibit 19.

We submit that there is no merit whatever in any of the objections raised by said defendants; and that the lower court erred in sustaining their said objections, as well as any objections which the plaintiffs made on the same grounds, or on the ground that the entire record was immaterial because John S. Watts in his lifetime had conveyed all of his title to Hawley.

ASSIGNMENT OF ERROR IX.

The court erred in striking out the testimony of Joseph E. Wise, in regard to his possession of a certain 160 acres, which he claimed by virtue of adverse possession only.

Joseph E. Wise testified that he had been in the peaceable, adverse possession, using and cultivating the same, of a certain 160-acre tract within the limits of Baca Float No. 3, for more than ten years prior to April, 1907, the date he obtained his deeds from Wilbur H. King and Mrs. A. M. Ireland, and that by virtue of such adverse possession he had, prior to obtaining their deeds, become the owner of the 160-acre tract, and ever since has been the owner thereof. Tr. pp. 385-392.

This testimony, on motion of the plaintiffs, was stricken from the record as being immaterial, upon the ground that the statute of limitations did not commence to run against any of the claimants of the Baca Float until the field notes and Contzen survey had been approved and filed by the Secretary of the Interior, on December 19, 1914; no segregation of the lands from the public domain being effected until the filing and approval of said survey. Tr. pp. 432-433. The court granted the motion ,to which ruling Wise excepted.

The only question involved in this assignment of error is, as to when the statute of limitations commenced to run in favor of one claiming by adverse possession only; whether from December, 1914, when the official survey

and plat was approved and filed; or from April 9, 1864, when the selection of the tract was approved.

The statute of Arizona on the subject of adverse possession only, is as follows:

> "Any person who has the right of action for recovery of any lands, tenements or hereditaments against another, having peaceable and adverse possession thereof, cultivating, using and enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward."
>
> Rev. Stats. of Ariz. (1901), par. 2938.
>
> Rev. Stats. of Ariz. (1913), par. 698.
>
> "The peaceable and adverse possession contemplated in the preceding section as against the person having right of action, shall be construed to embrace not more than 160 acres, including the improvements, or the number of acres actually inclosed, should the same be less than 160 acres....."
>
> R. S. A. (1901), par. 2939.
>
> R. S. A. (1913), par. 699.

As Wise had such adverse possesion, for more than ten years prior to April, 1907, of the 160-acre tract in question, his testimony to that effect was material; provided, that the statute of limitations is held to run against the claimants of the grant when the selection was approved, in 1864. If it is held that the statute

does not run until the approval and filing of the plat, in December, 1914, then the testimony was immaterial.

In the case of Lane v. Watts, 234 U. S. 525, being the suit by certain grant claimants to compel the Secretary of the Interior to approve and file the Contzen plat and survey of the Baca Float, the Supreme Court said:

> "We agree with the courts below that a survey was necessary to segregate the lands from the public domain. Stoneroad v. Stoneroad, 158 U. S., 240; 39 L. ed. 399. This was done by the Contzen survey, which we have seen was directed to be filed by the lower courts without alteration—a decision which we approve."

The Supreme Court of the United States, in other cases, involving Congressional grants of lands to railroads, has held that until the selection and map thereof is approved by the Land Department, the land is not segregated, but is part of the public domain, and is not subject to taxation.

> Wisconsin Central R. R. Co. v. Price County, 133
>
> U. S. 496; 33 L. ed. 687.
>
> U. S. v. Missouri K. & T. R. Co., 141 U. S. 358; 36 L. ed. 766.
>
> Ryan v. Central Pacific R. Co., 99 U. S. 382; 25 L. ed. 305.

But the Supreme Court, in the case of Lane v. Watts, supra, further decided that the title to the lands described

in the 1863 location passed absolutely to the heirs of Baca on the approval of said location on April 9, 1864. In this point the court said:

> "The crux of the case in the views of the court below, is the question whether title to the lands passed out of the United States in April. 1864....."

> "Appellants contend that 'under a proper construction of the Act of June 21, 1860, title to the "Float" cannot pass until there has been a final survey and a final determination by the proper officers that the land selected in 1863 was of the character which the statute permitted the heirs to take—a matter **sub judice** in the Department,' except as to certain conflicting ground. The appellees insist, and the courts below, as we have seen, decided that the location of the grant, and the approval of it by the Surveyor General of New Mexico, and subsequently, in April, 1864, by Commissioner Edmunds of the Land Office, transferred the title to the heirs of Baca."

The court, after considering the question, then said:

> The title having passed by the location of the grant, and the approval of it, the title cannot be subsequently divested by the officers of the Land Department. Ballenger v. U. S. 216 U. S. 240; 54 L. ed. 464. In other words, and specifically, the action of the Commissioner in approving the location of the grant cannot be revoked by his successor in office, and an attempt to do so can be enjoined."

After a further consideration the court goes on to say, as heretofore quoted:

> "We agree with the courts below that a survey was necessary to segregate the lands from the public domain."
>
> Lane v. Watts, supra.

If the title passed to the heirs of Baca in 1864, then they, or those claiming under them, had the right to bring a suit in ejectment against Joseph E. Wise any time after that date. They had the right of action against him when he first entered into possession of his 160 acre tract, and not having prosecuted that action for more than ten years after the right of action accrued, such action is barred under the Arizona statute, and Wise acquired a good title to the 160 acres by virtue of the Arizona statute of limitations.

If, however, the fact that no approval of the survey of Baca Float had been filed and approved, prevented the heirs of Baca, or those claiming under them, from bringing ejectment, then, of course, the Arizona statute of limitation would not run.

The Supreme Court of the United States, and the Supreme Court of Arizona, as well as other courts, have held, in regard to Mexican land grants, that while proceedings are pending before the tribunals of the United States for the confirmation of such grant, the statute does not run, and could not run, against the right of the claimant to the land in controversy; for the reason, that

the action of the Government, and the rights which perfected title insures to its possessor, cannot be impaired or defeated in any respect by the statute of limitations of the state.

Henshaw v. Bissell, 18 Wall. 255; 21 L. ed. 835.

Crittenden Cattle Co., v. Ainsa, 14 Ariz. 306; 127 Pac. 733.

Galendo v. Wittenmeyer, 49 Cal. 12.

Altschul v. ONeil, 35 Or. 202; 58 Pac. 95.

We appreciate that this is a very close question in the present case; but in view of the language of the decision in Lane v. Watts, supra, to the effect that absolute title vested in the heirs in 1864, we submit that these heirs, and those claiming under them, had the right to bring a suit in ejectment any time after 1864; and if they did have such right, then, as no subsequent title was obtained from the United States, the enforcement of the statute of limitations of Arizona would in no way impair the title which they had or could receive from the Government.

If this court takes this view of the law, then the lower court erred in sustaining the motion to strike out the testimony of Joseph E. Wise aforesaid.

ASSIGNMENT OF ERROR X.

The court erred in sustaining the motion of plaintiffs to strike out the testimony, and admissions as to the testimony, of defendant Lucia J. Wise, as to her title by adverse possession to a certain 40 acre tract of land.

The testimony referred to proved that Mary E. Sykes, mother of Lucia J. Wise, had been in adverse possession of a certain forty acre tract within the limits of Baca Float No. 3 continuously from the year 1900 until the date of her death, in the year 1913, that defendant Lucia J. Wise is her daughter and executor, and as such has title and possession to the same forty-acre tract.

This testimony, on motion of plaintiffs, for the reason stated in the preceding assignment, was also stricken from the record. Tr. p. 432.

As the same point is involved here as in the preceding assignment of error, we will not further discuss the same, except to say that the evidence further showed that said Mary E. Sykes had first entered the land as a homestead under the United States homestead law; also that Joseph E. Wise, in regard to his 160 acre tract, had done the same thing. However, as heretofore held by this Honorable Court, such a fact in no ways affects the question here involved.

> "Certainly the general rule is well settled that adverse possession of land, though held in admitted subordination to the title of the Government, may nevertheless, be adverse to everyone else."

Eastern Oregon Land Co. v. Brosnan, 97 C. C. A. 382; 173 Fed. 67.

ASSIGNMENT OF ERROR XI.

This assignment of error is not urged, and need not be considered.

ASSIGNMENT OF ERROR XII.

The court erred in overruling the objection of defendants Wise to the introduction in evidence by defendants Bouldin of certain deeds in the assignment of error mentioned.

Upon the trial of the case the court permitted, over the objection by defendants Wise, defendants Bouldin to introduce the following deeds and sheriff's certificate of sale, to-wit:

1. Deed from Powhatan W. Boudin to Dr. M. A. Taylor, dated November 7, 1894, being Defendants Bouldin Exhibit 1, Tr. p. 420.

2. Sheriff's Certificate of Sale, Joseph B. Scott. Sheriff, to Lionel M. Jacobs, dated December 4, 1894, being Defendants Bouldin Exhibit 2, Tr. p. 421.

3. Deed from Lionel M. Jacobs to M. A. Taylor, dated December 4, 1894, being Defendants Bouldin Exhibit 3, Tr. p. 425.

4. Deed from James E. Bouldin to M. A. Taylor, dated April 25, 1895, being Defendants Bouldin Exhibit 4, Tr. p. 426.

5. Deed from M. A. Taylor to Belle Bouldin, dated November 28, 1896, being Defendants Bouldin Exhibit 5, Tr. p. 427.

6. Deed from Daisy Belle Bouldin and James E. Bouldin to D. G. Gracy, dated April 16, 1900, being Defendants Bouldin Exhibit 5, Tr. p. 428.

7. Deed from D. B. Gracey to James E. Bouldin, dated June 15, 1904, being Defendants Bouldin Exhibit 7, Tr. p. 430.

The said deeds and sheriff's certificate of sale were only material to prove the deraignment of title of defendants Bouldin to whatever interest Powhatan W. Bouldin and James E. Bouldin had obtained in the lands in controversy, by virtue of that certain deed executed to Powhatan W. and James E. Bouldin by John C. Robinson, of date November 19, 1892, Defendants Wise Exhibit 38, which heretofore, in Assignments II and III, we have fully considered. If this court holds that said deed from Robinson to Powhatan W. Bouldin and James E. Bouldin only conveyed the north half of the tract of land described in the 1866 location, then neither Powhatan W. Bouldin nor James E. Bouldin obtained any title to the lands described in the decree herein, and the defendants Bouldin, as the grantees of Powhatan W. and James E. Bouldin, under those deeds,

or as their heirs, acquired no title; and the objection to the introduction in evidence of said deeds, on the ground of their being immaterial, should have been sustained.

In this connection we desire to call attention to the fact that the Sheriff's certificate of sale, Joseph B. Scott, sheriff of Pima County, to Lionel M. Jacobs, dated June 16, 1894, Defendants Bouldin Exhibit 2, being one of the muniments of title of defendants Bouldin, supra, recites that the same was issued under an order of sale issued out of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, in the action of Lionel M. Jacobs, as plaintiff, against Powhatan W. Bouldin, as defendant; being an entirely different judgment, and an entirely different order of sale, than the preceding judgment and order of sale in the case of Ireland and King vs. David W. Bouldin, defendant, and Leo Goldschmidt, administrator, defendant, heretofore considered.

Therefore, if this court holds that the deed from Robinson to Powhatan W. and James E. Bouldin, aforesaid, did not convey to them any interest in the tract of land described in the decree, being the lands described in the 1863 location, then the court erred in overruling the objections of defendants Wise to the introduction in evidence of each and all of said deeds and certificate of sale; because they were immaterial.

ASSIGNMENT OF ERROR XIII.

The court erred in permitting plaintiffs to introduce in evidence the instrument in writing executed by John S. Watts to William Wrightson, dated March 2, 1863, heretofore called the "Wrightson Title Bond," for the reason that plaintiffs deraign no title under said instrument; and in no event could the same be used to vary the description in the deed subsequently executed by John S. Watts to Christopher E. Hawley; and there was no evidence showing that Hawley himself claimed or deraigned any interest or title under said title bond.

Upon the trial of the case plaintiffs offered in evidence a certain instrument in writing, which we have called the "Wrightson Title Bond." Defendants Wise objected to the introduction thereof on the grounds that it was incompetent, irrelevant and immaterial, as fully set forth on p. 183-186 of the Transcript.

We have heretofore on pages 108-9 of this brief, under the title "The Wrightson Title Bond," set forth the instrument itself in full, and have there shown that it was utterly incompetent and immaterial, for the reason: in the first place, that Wrightson never assigned the same to Hawley, or to anyone else; and that even if he did, it was not competent evidence to aid in the description contained in the deed from John S. Watts to Hawley; for that deed stands alone as embodying the contract between the parties, and its terms cannot be altered by any previously executed instrument, which is not referred to or made a part of the deed.

We here refer to the argument made and the authorities cited on the foregoing pages of our brief, and we submit that the lower court erred in admitting the said Wrightson title bond in evidence.

ASSIGNMENTS OF ERROR XIV, XV, XVI, XVII, XVIII AND XIX.

These assignments all relate to errors committed by the court in regard to excluding evidence pertinent to a consideration of whether or not Antonio Baca was a son, and his children heirs, of Luis Maria Baca. These assignments will be considered in our separate brief in regard to the 1-19 interest of Antonio Baca.

ASSIGNMENT OF ERROR XX.

That the court erred in decreeing that until the tract of land described in the decree and in the 1863 location was segregated from the public domain of the United States by the filing and approval of the Contzen Survey, no adverse possession or statutory prescription could commence to be initiated by any party to this action.

We have already considered this assignment of error in our consideration of Assignment of Error IX, of this brief, to which we refer as being pertinent to a consideration of the foregoing assignment.

ASSIGNMENT OF ERROR XXI.

That the court erred in decreeing that defendant Joseph E. Wise was vested with an absolute fee simple title to no greater interest than an undivided 1-38 interest in the tract of land described in the decree; and erred in not rendering its judgment that Joseph E. Wise was the owner in fee of an undivided 2-3 interest of the undivided 18-19 interest inherited by the heirs of Jahn S. Watts, less the 1-54 interest of said 18-19 interest, which was owned by Intervenors, heirs of John Ireland, and in not quieting the title of said Joseph E. Wise thereto.

In considering the previous assignments of error we have shown that John S. Watts, owning on the 8th day of January, 1870, an undivided 14-19 interest in the tract described in the decree, being the tract described in the 1863 location; and also at that time being the owner of an undivided 14-19 interest in whatever title there was to the tract described in the 1866 location, by reason of the fact that he himself had requested the description of the tract to be amended by substituting the description of the 1866 location; did, on said 8th day of January, 1870, quitclaim to Christopher E. Hawley all the interest and title he then owned in and to the said tract described in the 1866 or amended location.

We have shown that thereafter, and on May 30, 1871, John S. Watts, by a deed of that date from the heirs of Baca to him, (Plaintiffs' Exhibit O, Tr. p. 197) acquired the remaining 4-19 interest in the tract de-

scribed in the 1863 location; so that when John S. Watts died, in 1876, he was the owner of all the interest theretofore acquired by him, except the 14-19 interest in the tract described in the 1866 location, which he had theretofore quitclaimed to Hawley.

The heirs of Watts inherited all of the tract described in the 1863 location, except an undivided 14-19 interest in the overlap, being that part of the tract which was overlapped by, or included within the limits of, the tract quitclaimed to Hawley, and Hawley acquired the 14-19 interest in this overlap.

The heirs of Watts, therefore, inherited an undivided 14-19 plus 4-19, or 18-19 interest in all the tract described in the decree, the 1863 location, except the "overlap;" as to which overlap Hawley acquired an undivided 14-19 interest; and the heirs of Watts the remaining 4-19 interest.

So that the title to the 18-19 interest to the entire tract described in the decree, which the heirs of Baca had, by their various deeds, conveyed to John S. Watts in his lifetime, was owned in fee, upon the death of Watts, in 1876, as follows:

Heirs of John S. Watts, 18-19 interest in all the tract exclusive of the overlap.

Heirs of John S. Watts 4-19 interest in the overlap.

Christopher E. Hawley 14-19 interest in the overlap.

Heirs of Antonio Baca 1-19 interest in the entire tract.

Transfers of the interest inherited by the heirs of John S. Watts.

The just mentioned 18-19 interest of the Watts heirs in the entire tract exclusive of the overlap; and their 4-19 interest in the overlap, was transferred, conveyed and is now owned, as shown by the record in this case, as follows:

(a) The heirs of Watts, by deed of September 30, 1884, (Defendants Wise Exhibit 16, Tr. p. 272) conveyed an undivided 2-3 of all their right, title and interest in tract described in the decree, to David W. Bouldin. David W. Bouldin thereby acquired an undivided 2-3 of the 18-19, or 36-57, interest in the entire tract exclusive of the overlap; and an undivided 2-3 of the 4-19 or 8-57 interest in the overlap.

The title to the interest inherited by the Watts heirs then stood.

Heirs of Watts, 1-3 of 1-18 or 18-57 to entire tract, exclusive of overlap.

Heirs of Watts, 1-3 of 4-19, or 4-57 interest in overlap.

David W. Bouldin 2-3 of 18-19 or 36-57 in entire tract, exclusive of overlap.

David W. Bouldin, 2-3 of 4-19 or 8-57 interest in overlap.

(b) David W. Bouldin, by deed of February 21, 1885, (Defendants Wise Exhibit 18, Tr. p. 312) con-

veyed an undivided 1-9 of all the interest which he had acquired from the heirs of Watts, to John Ireland and Wilbur H. King.

As the interest which Bouldin had acquired from the Watts heirs, as above just set forth was, 36-57 to all the tract except the overlap, and 8-57 in the overlap, the interest so conveyed by him to Ireland and King was 1-9 of 36-57 or 4-57 interest in all the tract except the overlap; and 1-9 of 8-57 or 8-513 interest in overlap.

The title to the interest acquired by David W. Bouldin then stood:

David W. Boudin:

Tract exclusive of overlap, 32-57 interest.

Overlap 64-513 interest.

Ireland and King:

Tract exclusive of overlap, 4-57 interest.

Overlap 8-513 interest.

(c) John Ireland and Wilbur H. King, by deed dated February 7, 1894, (Plaintiffs Exhibit Y, Tr. p. 219), conveyed all their interest in the overlap to Alexander F. Mathews; their interest in the overlap at that time being, as just above set forth, an 8-513 interest therein.

(d) The heirs, devisees and executors of Alexander F. Mathews, by deed dated February 8, 1907, conveyed all the interest acquired by Alexander F. Mathews in

his lifetime, to plaintiffs, Watts and Davis, (Plaintiffs' Exhibit W, Tr. p. 214), and under this deed plaintiffs have acquired the 8-513 interest in the overlap so conveyed to Alexander F. Mathews by Ireland and King.

(e) All the interest of David W. Bouldin, remaining in him after his deed to Ireland and King, of February 21, 1885, supra, was sold at sheriff's sale on July 31, 1895, as heretofore shown, to Wilbur H. King. The interest which David W. Bouldin had and so acquired by King was, as set forth in (b) supra: 32-57 interest in all the tract exclusive of the overlap, and 64-513 interest in the overlap.

(f) Wilbur H. King, by deed dated April 24, 1907, (Defendants Wise Exhibit 24, Tr. p. 320), conveyed all his interest in the entire tract to Joseph E. Wise. The amount of interest he then owned, and which Wise by this deed acquired, was as follows:

1-2 of the 4-57 interest conveyed to Ireland and King, by deed from David W. Bouldin, in the tract exexclusive of the overlap, which is 1-2 of 4-57, or 2-57 interest. (See (b) supra).

All the interest which Ireland and King theretofore had acquired in the overlap, had prior to this deed to Wise, been conveyed to Alexander F. Mathews. (See (c) supra.)

Also, all the interest acquired by King under the sheriff's sale, in the suit against Bouldin, being 32-57

interest in all the tract, exclusive of the overlap, and 64-513 interest in the overlap.

So the interest acquired by Wise under his deed from King was:

2-57 plus 32-57, or 34-57, in the tract exclusive of the overlap.

64-513 interest in the overlap.

(g) The remaining 1-2 of the 4-57 interest conveyed by Bouldin to Ireland and King, was owned by John Ireland; for King and Ireland each owned 1-2 of the total 4-57 interest conveyed to them jointly by Bouldin, in his deed to them of February 21, 1885.

John Ireland died intestate on March 15, 1896, owning this 1-2 of 4-57 interest or 2-57 interest in the entire tract, exclusive of the overlap. He had conveyed his interest in the overlap, in his lifetime, to Alexander F. Mathews, as heretofore shown, (c) supra.

It was stipulated by all the parties to this action, that John Ireland died intestate; that his widow was entitled to the one-half of his estate, and that the following heirs were entitled to the other one-half in the following proportions, to-wit: Mrs. M. I. Carpenter 1-4, Pat C. Ireland 1-4, Ireland Graves 1-4, Anna R. Wilcox 1-8 and Eldredge I. Hurt 1-8.

So the 2-57 interest in the entire tract exclusive of the overlap, owned by John Ireland at the time of his death, descended as follows:

Mrs. A. M. Ireland, widow, 1-2 of 2-57, or 1-57.

Mrs. M. I. Carpenter, 1-4 of 1-2, or 1-8 of 2-57, or 2-416.

Pat C. Ireland, 1-4 of 1-2, or 1-8 of 2-57, or 2-416.

Ireland Graves, 1-4 of 1-2, or 1-8 of 2-57, or 2-416.

Anna R. Wilcox, 1-8 of 1-2, or 1-16 of 2-57, or 1-416.

Eldredge I. Hurt, 1-8 of 1-2, or 1-16 of 2-57, or 1-416.

(h) Mrs. A. M. Ireland, widow of John Ireland, by deed dated April 8, 1907 (Defendants Wise Exhibit 25, Tr. p. 323), conveyed all her interest, being as above shown, 1-57 interest in the entire tract exclusive of the overlap, to Joseph E. Wise.

(i) John Nelson, Sheriff of Pima County, by deed dated October 5, 1914, (Defendant Wise Exhibit 26, Tr. p. 323; also p. 520) under the order of the Superior Court of Pima County, Arizona, in the case of Ireland and King vs. David W. Bouldin, conveyed to Joseph E. Wise, assignee and grantee of Wilbur H. King, all the right, title and interest which David W. Bouldin had on March 14, 1893, the date of the levy of attachment, in and to the tract of land described in the decree; being a curative deed under the sheriffs sale theretofore made to Wilbur H. King.

(j) The heirs of John S. Watts, by mesne conveyances, conveyed in 1899, and thereafter and in 1913,

all their interest to James W. Vroom, and Vroom thereafter conveyed to defendant Santa Cruz Development Company.

The interest which the heirs of Watts owned when they conveyed to Vroom, as shown (a) supra, was: 18-57 in entire tract exclusive of the overlap, and 4-57 interest in the overlap.

Present ownership of Baca Float No. 3, as shown by the record:

1. The undivided 1-19 interest inherited by the heirs of Antonio Baca in the entire tract, as decreed by the court, by Joseph E. Wise and Margaret W. Wise, each having 1-38 interest in the entire tract.

2. The remaining 18-19 interest is owned, as shown by the record in this case, as follows:

First. The tract exclusive of the overlap:

Joseph E. Wise—

Under deed from King (f supra)	34-57
Under deed from Mrs. M. A. Ireland (g supra)	1-57
Total for Wise	35-57

Santa Cruz Development Company—

Under deed from Watts heirs (j)	18-57

Intervenors, heirs of John Ireland—

Mrs. M. I. Carpenter	2-416
Pat C. Ireland	2-416

Ireland Graves	1-416	
Anna R. Wilcox	1-416	
Eldredge I. Hurt	1-416	
Total for heirs, 8-416, or 1-57		1-57
Total, 18-19, or		54-57

Second. The Overlap:

Plaintiffs, Watts and Davis—

Under Hawley deed, 14-19, or	378-513
Under Ireland and King deed (d supra)	8-513
Total for plaintiffs	386-513

Joseph E. Wise—

Under deed from King (f supra)	64-513

Santa Cruz Development Co.—

Under deed from Watts heirs (j supra), 4-57, or	36-513

386 plus 64 plus 36 equals 486-513, or 18-19.

The evidence in this case shows that the said 18-19 interest in said tract is owned as follows, to-wit:

Plaintiffs, an undivided 386-513 interest in the overlap, and no more.

Joseph E. Wise, an undivided 35-57 in all the tract exclusive of the overlap, and 64-513 interest in the overlap.

Santa Cruz Development Company, 18-57 interest

in all the tract exclusive of the overlap, and 36-513 interest in the overlap.

Intervenors, an undivided 1-57 interest in all the tract, exclusive of the overlap.

We ask this court to reverse the decree herein, and itself adjudge that the said Joseph E. Wise to be the owner in fee, in addition to said 1-38 interest aforesaid, to an undivided 35-57 interest in all the tract described in the decree, exclusive of the overlap; and to an undivided 64-513 interest in the said overlap.

And that the remaining interest be adjudged to be owned by the other parties, in the respective proportions as hereinabove set forth.

ASSIGNMENT OF ERROR XXII.

That the court erred in decreeing that the various recorded instruments purporting to inure to the benefit of the plaintiffs, or to the benefit of defendants Bouldin, or purporting to be in hostility to the title adjudicated in favor of said plaintiffs and said defendants Bouldin, be removed as clouds upon their title; and in removing the same as clouds upon the title so adjudicated to said plaintiffs Bouldin.

The questions involved in this assignment of error have been heretofore considered in our argument upon Assignments of Error I, II and III. We have shown that

plaintiffs and defendants Bouldin do not own the title adjudicated to them by the court; that the decree in this regard is erroneous; and if this be so, it necessarily follows, the court further erred in decreeing the removal of the alleged clouds on said title.

ASSIGNMENT OF ERROR XXIII.

That the court erred in decreeing that the temporary injunction theretofore granted plaintiffs against Joseph E. Wise, as modified, be made permanent as to the south half of the tract or parcel of land in said judgment and decree described; and erred in not dissolving said injunction.

The injunction referred to, which is made permanent by the decree, was a temporary injunction, issued pending the action, upon the application of plaintiffs, wherein the defendant Joseph E. Wise was enjoined, pending the action, from erecting fences on Baca Float No. 3; from interfering with any road, trail, path or other means, by which cattle have been or are accustomed to go to or return from the watering places on said Float; and requiring Wise to remove from such places any obstructions to the free access of such watering places, heretofore erected by him. This injunction was thereafter modified by permitting Wise to repair certain fences which he had theretofore erected on the Baca Float; but enjoined him from driving or placing any additional cattle upon that part of the Baca Float No. 3 which lies west of the Santa Cruz river.

This injunction the court has, by its decree, made perpetual. Tr. p. 538.

This is a suit to quiet title. There are no allegations in the complaint in regard to Wise fencing any of the lands; or in regard to his depriving plaintiffs of possession; or in regard to plaintiffs having any cattle; or requiring watering places; or anything of the kind.

Plaintiffs filed their complaint June 24, 1914. Thereafter they made application for a temporary injunction, wherein they alleged that they had brought suit to quiet title to Baca Float No. 3; that the defendants Wise—we will quote from the petition: "had threatened to build a fence around the said float and to enclose the same with said fence. That said defendants Wise had actually commenced the erection and construction of said fence, and are unlawfully attempting to enclose said lands, or a large portion thereof, with said fence, and unlawfully attempting to deprive the plaintiffs of the possession of said lands, or a large portion thereof; and that said acts on the part of said defendants Wise are without any authority of the plaintiffs, and against plaintiffs will, and without their consent; that the defendants Wise will, unless restrained by the order of the court, continue to build and construct such fence until such fence is completed entirely around said lands, or a large portion thereof, and that the building of said fence by said defendants Wise and the enclosing of said lands and premises by said fence will change the existing conditions of the property involved in this suit to the prejudice and disadvantage of

the plaintiffs, and contrary to, and in violation of the rights of the plaintiffs, and prevent the plaintiffs from securing the full benefit of the decision of this court, should the same be in their favor, and disturb the **status quo** existing at the time of the institution of this suit." Tr. p. 120.

And the plaintiffs then pray, that "an order to show cause why the defendants Wise, their agents, attorneys and representatives, should not be restrained from continuing or completing the building of said fence, or otherwise changing the **status quo** of said property, be granted plaintiffs, returnable," etc. Tr. p. 124.

Wise was served with notice to show cause, and in response thereto, on June 30, 1914, filed his affidavit in which he sets forth that he claimed a large undivided interest in the Baca Float No. 3; that he was, and for many years had been, in actual possession of a large part thereof; that he was engaged in the business of raising cattle, and grazed his cattle upon Baca Float, and for that purpose had at large expense erected a number of fences upon the tract, and had also erected a number of fences so as to keep the cattle of persons having no interest in Baca Float from off the same; and he denied that he threatened to enclose the entire Float with fences; denied he was attempting to deprive plaintiffs of possession of the Float; alleged that prior to the bringing of the present action he had constructed over thirty miles of fences on the grant, which greatly increased the value of the property; denied that the building of these fences, or the building of such as were

torn down, would disturb the **status quo** existing when the suit was brought; and averred that it was necessary that the fences, which he had theretofore erected, be kept intact, so as to keep the cattle of persons who had no interest therein from off the grant. Tr. p. 125.

On July 9, 1914, Wise filed a supplemental affidavit in said matter. Tr. p. 131.

It will be noted from the petition filed by plaintiffs, all they sought was to enjoin Wise from constructing a fence **entirely around** the lands in question, as it would deprive plaintiffs from the benefit of a decision in their favor, and disturb the **status quo** existing at the time of the institution of this suit. The court, however, on July 30, 1914, ordered an injunction to issue, to be in force pending the action, which went far beyond anything that the plaintiffs asked for in their petition. The injunction is as follows:

"ORDERED: That the defendant Joseph E. Wise, and George Wise, as agent of the defendants Jesse H. Wise and Margaret W. Wise, be, and they and each of them, their and each of their attorneys, agents, employes and other representatives, and each and every of them, are hereby, during the pendency of this suit, enjoined from changing the **status quo** existing on Baca Float No. 3 as it existed on the 23d day of June, 1914; and from erecting any fences in, upon or around said Float, or any portion thereof, or fencing, closing, stopping, or otherwise interfering with any road, trail, pathway, or other means by which cattle have been or are accustomed to go to or return from the watering places

on said Float, and to remove from such places any obstructions to the free access to said watering places, heretofore erected by them, or any of them; provided, that this injunction shall not extend to the land occupied by Joseph E. Wise at Calabasas, as his homestead." Tr. p. 134.

This injunction was so erroneous and burdensome, and so far outside of the injunction which had been asked for, that thereafter, and on September 28, 1914, Joseph E. Wise filed a motion for a modification of this injunction. In this petition for modification Wise, amongst other things, recites:

> "That said injunction goes beyond said petition for an injunction filed by plaintiffs, and beyond the order of this court to show cause, and is indefinite and uncertain to such an extent, that this defendant, who is desirous ot carefully observing the orders and injunctions of this court, does not and cannot know the scope and extent thereof, and said injunction goes further, and in effect, deprives this defendant of the right to use certain pastures which he has enclosed within the limits of said grant, and were enclosed a long time before the filing of said petition * * *
>
> "This defendant for many years has been and still is, engaged in grazing cattle on the ranch, and all of said pastures are necessary for him to use in his business, but the injunction of this court restrains him from using the same, to his great loss and damage." Tr. p. 136-146.

He further shows that many of his fences have been

unlawfully cut by unknown parties and how the injunction restrains him from repairing the same, and so on. Tr. p. 142.

Thereafter, and on November 6th, 1914, the court made an order modifying the injunction which had theretofore been issued, in the following particulars, to-wit:

> "That the said Joseph E. Wise be and hereby is permitted to repair and rebuild that certain fence on Baca Float No. 3 known as the 'Garden Fence,' which fence extends from a point on the easterly line of said Float, about a mile and a half north of the north line of the Sonoita Grant, and thus extends in a general westerly and southerly direction to the north line of the Sonoita Grant at a point about a mile and a half or two miles west of the east line of the Baca Float; and also that the said Joseph E. Wise may be permitted to repair and rebuild the fence around what is known as the San Caytano pasture; and that said injunction, as herein modified, shall be enforced until the further order of this court.
>
> It is further ordered that any of the parties hereto may, at any time, apply to this court for a further or any modification of this injunction at any time, upon giving reasonable notice thereof.
>
> **It is further ordered that the said Joseph E. Wise shall not drive upon or place upon that part of Baca Float No. 3 lying west of the Santa Cruz river, any cattle or livestock beyond and in addition to the cattle and livestock which he has now running upon said part of said Float.**

It is further ordered that the modification of the said injunction shall in no manner affect the possession, or claim of possession, of either party hereto, to the whole or any part of Baca Float No. 3, but said question of possession shall be determined without regard to said modifications." Tr. p. 147.

About one year thereafter, to wit, November 1, 1915, the court rendered its decree herein, and in that decree, amongst other things, adjudges:

> **"Seventh:** That the temporary injunction heretofore granted against Joseph E. Wise, as modified, **is hereby made permanent** as to the south one-half of the tract or parcel of land hereinbefore described, and is dissolved as to the north one half thereof." Tr. p. 538.

The reason the injunction was dissolved as to the north half was because the court decreed plaintiffs to have no title whatsoever to the north half of Baca Float No. 3, and defendants Bouldin had made no application for an injunction.

But in this same decree the court adjudges that Joseph E. Wise **is** the owner in fee simple of an undivided 1-38 interest, and Margaret W. Wise the owner of an undivided 1-38 interest, in all of Baca Float No. 3; and the court decrees the plaintiffs to be the owners of the remaining 18-19 interest in the south half thereof.

Plaintiffs and defendant Joseph E. Wise are therefore, tenants in common, under the very decree which

enjoins Wise perpetually from pasturing his cattle on parts of the grant, and from erecting such fences as he may deem necessary, and from preventing cattle from the outside going to the watering places on the grant, and so on.

There are no allegations in the complaint, filed by plaintiffs in this case, in regard to Joseph E. Wise fencing, or threatening to fence, or to graze cattle, or in any way to use or occupy Baca Float No. 3; and no allegations upon which an injunction could be predicated.

In the relief prayed for by plaintiffs in their complaint, they only seek to have their titles quieted, and alleged clouds removed.

No issue is made by the pleadings in regard to Wise's right to erect fences, or to graze his cattle, or in any way to use the grant, as he, a tenant in common, has a right to use it.

Nor, upon the trial of this case, was one particle of evidence introduced on the subject of Wise's fences, or grazing cattle, or anything of the kind, except the meagre testimony of George Atkinson.

Atkinson testified as a witness on behalf of plaintiffs, that he went into possession of Baca Float No. 3 under the terms of a lease from plaintiffs on June 13, 1914; that Joseph E. Wise occupied a large part of the property; that he, Atkinson, fenced probably 80 acres; that Wise had got one pasture on the Baca Float of about 1000 acres, known as the Garden pasture; that Wise's

biggest pasture is Sinquitona, with probably 4000 acres in it, and that Wise has absolute control of that pasture because he has got it fenced. That Wise also used a lot of other grazing land for his cattle; that he, the witness, was using more of this property now, than he did before the lease was given to him; that he had paid no money directly as rent under his lease; but had done work for Watts and Davis, which he probably would get credit for; that he agreed to pay pasturage, the same as he paid the government of the United States; that Wise did not give his consent to the fencing done by the witness. Tr. p. 231-233.

It is upon this testimony of Atkinson, and that alone, that the lower court decreed the injunction it theretofore had issued, should be made perpetual.

We have assigned this portion of the decree to be erroneous for the following reasons, as set forth in our Assignment of Error XXIII:

1. That this is an action to quiet title and remove clouds and not an action to restrain trespass, or to determine any rights of possession of the respective parties to the action, in the lande in dispute, and the decree of the court, restraining the right to possession and enjoyment of defendant Joseph E. Wise to the south half, or any part of said lands, is erroneous.

2. That no issue in regard to trespass or rights of possession or fencing is made or raised by the pleadings and no such issues were in the case.

3. That there is no testimony or evidence in the case which proves or tends to prove, that said Wise had been, or was doing, any of the matters or things, or threatened to do any of the matters or things which the court had enjoined him from doing.

4. That the only object of the said injunction when first issued, was to preserve the property in **status quo** pending said action, and said object having been attained, it was the duty of the lower court to have dissolved the injunction and to have dismissed the same, upon rendering its decree, which decree does adjudge and find that Joseph E. Wise has an undivided interest in all of said tract of land.

5. That the judgment and decree of this court is that said defendant Joseph E. Wise is a tenant in common with the plaintiffs as to the south half of the tract of land aforesaid, and that his interest is undivided, and the injunction in said decree perpetually enjoins said Wise from the exercise of his rights and the use and enjoyment of said property as a tenant in common with plaintiffs, and is against the law and is not supported by any of the evidence in the case."

The decree in this regard is so manifestly erroneous that argument seems unnecessary.

We will leave it to counsel for Watts and Davis, appellees herein, who prevailed upon the lower court to make this injunction perpetual, to explain to this Honorable Court upon what basis such a decree can be sup-

ported in an action like this, which is a suit to quiet title; where there are no allegations in the pleadings, and no evidence introduced upon the trial which support this decree making the injunction perpetual.

We think a mere statement of the record shows this decree, making the injunction perpetual, is erroneous, and we ask that this part of the decree be reversed.

ASSIGNMENT OF ERROR XXIV.

That each and all of the errors hereinbefore assigned are also assigned for the benefit of Intervenors M. I. Carpenter, Patrick C. Ireland, Ireland Graves, Anna R. Wilcox, and Eldredge I. Hurt, the heirs of John Ireland, deceased.

As these Intervenors have joined Joseph E. Wise and Lucia J. Wise in this appeal, each and all of the foregoing assignments of error, and the argument thereon, are also submitted in their behalf.

CONCLUSION.

From a consideration of the foregoing assignments of error, we submit that the lower court erred:

1. In adjudging plaintiffs to be the owners of an undivided 18-19 interest in the south half of the lands in dispute.

2. In decreeing defendants Bouldin to be the owners of an undivided 18-19 interest in the north half of said tract.

3. In adjudging that the statute of limitations did not run in favor of adverse possession until the approval and filing of the Contzen survey, in December, 1914, and in striking out the evidence of Joseph E. Wise as to adverse possession.

4. In making perpetual the injunction against Josept E. Wise, enjoining him from such use of the land as his ownership as a co-tenant entitles him to.

5. That the lower court further erred, after permitting the introduction in evidence of the deed from the Watts heirs to David W. Bouldin, and the judgment and proceedings resulting in the sheriff's sale of the interest of said Bouldin to King, in sustaining objections to said documents. And as to all said matters which affect the ownership of the undivided 18-19 interest in said lands, we ask said decree to be reversed.

And, whereas, said deed from Watt's heirs to Bouldin, and the judgment and judicial proceedings, afore-

said, are a part of the record of this case; and as these documents and the deeds under which Joseph E. Wise and all the other parties to this suit deraign title, are also in the record, we ask this Honorable court itself to adjudge and decree that the tract of land in dispute in this action is owned, as heretofore set forth in this brief, in the following proportions, and by the following parties, to wit:

1. That the undivided 1-19 interest inherited by the heirs of Antonio Baca, is owned in fee as decreed by the lower court, to wit: 1-2 thereof in each Joseph E. Wise and Margaret W. Wise; each having thereunder 1-38 interest in the entire tract.

2. That the remaining 18-19 interest is owned in fee as follows:

First. The tract exclusive of the overlap.

Joseph E. Wise,		35-57 interest
Santa Cruz Development Company		18-58 interest
Intervenors, heirs of John Ireland,		
Mrs. M. I. Carpenter,	2-416	
Pat C. Ireland,	2-416	
Ireland Graves,	2-416	
Anna R. Wilcox,	1-416	
Eldredge I. Hurt,	1-416	— 1-57 interest

Second. The tract we call the "overlap."

Plaintiffs, Watts & Davis,	386-513 interest

Joseph E. Wise, 64-513 interest

Santa Cruz Development Company, 36-513 interest

Respectfully submitted,

SELIM M. FRANKLIN,

Attorney for appellants, Joseph E. Wise and Lucia J. Wise.

This brief is also submitted on behalf of Intervenors, appellants.

JOHN D. MACKAY,

Attorney for Intervenors, Mrs. M. I. Carpenter, et al.